89-739

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DAVIS ENTERPRISES, SUN PIPE LINE COMPANY, SUN COMPANY, INC., and E.A. DESIGN, LTD.,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY and BRUCE DIAMOND,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November 6, 1989
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QUESTIONS PRESENTED*

1. Whether action of a Regional Counsel of the Environmental Protection Agency in denying a request by Petitioners under applicable regulations, 40 C.F.R. §§ 2.041 *et seq.*, that an agency employee provide deposition testimony in private civil litigation was subject to judicial review?

2. Whether the court of appeals erred in ruling that a Regional Counsel of the Environmental Protection Agency did not act arbitrarily, capriciously, or contrary to law, in rejecting Petitioners' request that an agency employee provide essential factual evidence by way of deposition testimony in private civil litigation?

3. Whether, absent exigent circumstances, a federal administrative agency may bar one of its employees from giving testimonial evidence by deposition in a private civil suit where the evidence to be adduced is factual, not expert, in nature, and no other witness is competent to testify regarding the pertinent matter?

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*In the court of appeals, Petitioners prevailed on the first question presented.

THE PARTIES

Petitioner Davis Enterprises ("Davis") is a partnership of two individuals with offices in Cherry Hill, New Jersey. Petitioner has numerous real estate investments and several closely held corporate affiliates which own and operate cable television franchises. One such affiliate is Newtown Cablevision, Inc., with a cable television franchise in Newtown Township, Bucks County, Pennsylvania.

Petitioner Sun Pipe Line Company ("SPL") is incorporated under the laws of Pennsylvania and has its principal office in Tulsa, Oklahoma. It owns and operates petroleum pipelines in numerous states, and it transports both refined petroleum products and crude oil. SPL is an indirectly-owned subsidiary of Petitioner Sun Company, Inc. through a holding company, Sun Pipe Line Company of Delaware. One of SPL's underground pipelines traverses Newtown Township in Bucks County, Pennsylvania. This pipeline was ruptured in an accident in 1982 during construction of the cable television system in Newtown Township.

Petitioner E.A. Design, Ltd. ("EAD") is an engineering firm with offices in Fort Washington, Pennsylvania. EAD is in the business of preparing plans for the overhead and underground routing of cable television systems. EAD contracted with an affiliate of Davis Enterprises to prepare plans for the construction of the cable television system in Newtown Township.

Respondents are the Environmental Protection Agency ("EPA"), an agency of the United States government, and Bruce Diamond, Regional Counsel for EPA Region III in Philadelphia, Pennsylvania.

RULE 28.1 LISTING

SUN COMPANY, INC.,
SUBSIDIARY, AFFILIATE AND INVESTMENT LIST

Cos Corporation

Japan Sun Oil Company, Ltd.

Marine Investment Company of Delaware
- Alaska Bulk Carriers, Inc.
- Aston Shipping Company
- Delaware Sun Shipping, Inc.
- Delaware Valley Marine Agency & Repair, Inc.
- Eastern Sun Barge Company
- Eastern Sun Shipping, Inc.
- Florida Barge Company
- Glacier Bay Transportation Corporation
- Millcreek Leasing Corporation
- New Jersey Sun Shipping, Inc.
- New York Sun Shipping Co., Inc.
- Northern Sun Shipping Co., Inc.
- Sarnia Shipping Company, Inc.
- Welland Shipping Company, Inc.
- Pennsylvania Sun Shipping, Inc.
- Philadelphia Sun Shipping Co., Inc.
- PWS, Inc.
- Sun Barge Company
- Sun Transport, Inc.
- Texas Sun Shipping, Inc.
- Tropic Sun Shipping Co., Inc.
- Western Sun Shipping, Inc.

Mascot Petroleum Company, Inc.

Mohawk Valley Oil, Inc.

Petrosun Limited

Prestige Lubricants, Inc.

Stop-N-Go Foods, Inc.
- Buckeye Marketers, Inc.
- Big Top Market, Inc.

Diversified Retailers, Inc.
J.M.J. Enterprises, Inc.
King Kwik Minit Market Inc.
Convenience Store Distributing Company
Drive-In Groceries, Inc.
Kwik Sav, Inc.
Sioux Foods, Inc.
Casual Food Stores, Inc.
Stop-N-Go Foods Of Dayton, Inc.
Stop-N-Go of Ohio, Inc.
Stop-N-Go of Southern Minnesota, Inc.
Stop-N-Go, Inc.
Hoosier Stop-N-Go, Inc.
Super-Go Marketers, Inc.
Tri-State Stop-N-Go, Inc.

Sun International Limited
Sun Hydroponics Limited
Sun Oil International Limited

Sun Oil Export Company

Sun Oil Trading Company

Sun Pipe Line Company of Delaware
Explorer Pipeline Company
Inland Corporation
Mid-Continent Pipe Line Company
Mid-Valley Pipeline Company
Sun Oil Line Company of Michigan
Sun Pipe Line Company
Industries for Tulsa, Inc.
Gulf Coast Marine Fueling, Inc.
Sun Marine Terminals Company
Sun Pipe Line Services Co.
Sun Terminals, Inc. of Louisiana
West Texas Gulf Pipe Line Company

Sun Refining and Marketing Company
Hemisphere Oil Company, Inc.
Mid-State Oil Company

Puerto Rico Sun Oil Company
Puerto Rico Sun Realty Company, Inc.
Sun Far East Trading, Inc.
Sun FSC, Inc.
Sun International (Puerto Rico), Inc.
Sun Oil Far East, Inc.
China Sun Oil Company
Sun R&M Investment Company

Suncrest Industries, Inc.

Sunoco Limited

Sunoco Overseas, Inc.
Lugrasa, S.A.

DAVIS ENTERPRISES AFFILIATES

Newtown Cablevision, Inc.
Maple Shade Cable Company

E.A. DESIGN, LTD.

No Subsidiaries or Affiliates

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v.

ENVIRONMENTAL PROTECTION AGENCY AND BRUCE DIAMOND,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Davis Enterprises, Sun Pipe Line Company, Sun Company, Inc., and E.A. Design, Ltd., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* A-1 to A-23) is reported at 877 F.2d 1181. The court of appeals' order upon denial of a petition for rehearing (App., *infra,* A-24) is also reported at 877 F.2d 1181. The opinion and order of the district court (App., *infra,* A-25 to A-34) are unreported. The decisions of the Regional Counsel, Environmental Protection Agency Region III, are set out in the Appendix, *infra,* at A-47 to A-48 and at A-54 to A-56.

JURISDICTION

The judgment of the court of appeals (App., *infra*, A-17) was entered on June 27, 1989, and a timely petition for rehearing was denied on August 8, 1989 (App., *infra*, A-24).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c), and Sup. Ct. R. 20.4.

STATUTORY PROVISIONS INVOLVED

Section 706(2)(A) of Title 5, United States Code, is set forth in the Appendix at A-35.

The pertinent regulations of the Environmental Protection Agency ("EPA"), 40 C.F.R. Part 2, Subpart C, §§ 2.401-2.406, are set forth in the Appendix at A-36 to A-42.

STATEMENT OF THE CASE

A. Factual Background, The Underlying Litigation

Sun Pipe Line Company ("SPL") is the owner and operator of an underground petroleum pipeline which runs from Marcus Hook, PA to Newark, NJ. The pipeline was punctured by a cable television contractor on November 12, 1982, in Newtown, Bucks County, PA, resulting in a net loss of approximately 50,000 gallons of unleaded gasoline into the ground. In subsequent months, gasoline vapors entered the basements of a number of homes in an adjacent housing development known as Newtown Crossing.

On or about May 18, 1983, the case of *Pier Cipriani, et al. v. Sun Pipe Line Company, et al.*, No. 83-03557-11-2, was filed in the Court of Common Pleas for Bucks County. The *Cipriani* case is a class action with nine families named as plaintiffs. Among other things, the complaint alleges property damage and various adverse health effects suffered by homeowners in Newtown Crossing. Davis Enterprises ("Davis") and its contractor, Tri-State Telecommunications, Inc. ("Tri-State") were also named as defendants. SPL, Davis and Tri-State were all alleged to have caused the accident through negligence, and SPL was additionally alleged to be strictly liable. Davis and Tri-State later joined third-party defendants, E.A. Design, Ltd., and Jan Gouza and Pickering, Corts and Summerson, Inc. ("PCS"). Gouza and his firm, PCS, were the township engineers for Newtown Township.

In April 1983, before the homeowners' suits were filed, EPA was invited by the Pennsylvania Department of Health ("PA DOH") to do air monitoring in numerous homes in Newtown Crossing. The monitoring arose out of requests by certain homeowners to the PA DOH to have an independent agency do testing to obtain unbiased results regarding the levels of hydrocarbons present in their homes. In April 1983, two or three EPA employees did air monitoring with a portable gas chromatography machine and Tenax tubes in ten homes in

Newtown Crossing on four different dates. Some of the homes were monitored only once or twice.

Beginning in February 1984, numerous cases were filed by "opt-out" plaintiffs in the Court of Common Pleas for Bucks County, including *Joseph Hudachek, et al. v. Sun Company, Inc., et al.*, No. 84-01113-11-2, and several others. These suits are similar to the *Cipriani* action in that the plaintiffs are alleging property damage and adverse health effects as a result of the pipeline accident.

The air monitoring tests done by EPA in Newtown Crossing were requested by Mr. Gary Schultz of PA DOH and reported by EPA to Mr. Schultz. EPA did not do the testing pursuant to any regulatory program it was then enforcing. However, the Centers for Disease Control, PA DOH, and the Bucks County Department of Health used the EPA data (and data obtained by an industrial hygiene firm hired by SPL) to develop health criteria regarding exposure to gasoline vapors.

On February 21, 1985, the Court of Common Pleas certified the class in the *Cipriani* action as to common issues of fact on liability, but it held that each plaintiff would have to prove damages individually. The certified class consists of 200 homeowners.

In September and October, 1986, the liability trial was held in the *Cipriani* action. SPL and four other co-defendants were held by the jury to be causally negligent for the pipeline accident under comparative negligence principles.[1]

Subsequent to the jury verdict on liability, trial preparation began in earnest on the homeowners' damage claims. Two cases in particular, the *Melso* claim (class action plaintiffs), and the *Hudachek* claim (opt-out plaintiffs), were designated by the trial judge as the first two claims to be tried.

In pre-trial discovery, SPL served requests for admissions to the Hudachek and Melso plaintiffs to admit the authenticity

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1. SPL was held 18% liable. The contractor who punctured the pipeline, Tri-State, was held 40% liable; the cable television company, Davis, was held 13% liable; the township engineer, Gouza, and his firm, Pickering, Corts and Summerson, Inc., were held 15% liable; and the firm which drew the maps omitting the pipeline, E.A. Design, was held 14% liable.

and truth of the reported results obtained by EPA. Both the Hudachek and Melso plaintiffs refused to admit the truth of the EPA results without first having had an opportunity to cross-examine the EPA employees who did the work.

B. Petitioners' Requests to EPA

On April 3, 1987, soon after receipt of plaintiffs' answers to the requests for admissions, counsel for SPL wrote to the EPA General Counsel in Washington, D.C. to request permission to videotape a deposition of one of the EPA employees who had done the work in Newtown Crossing and was then working in Massachusetts. The circumstances underlying the request were briefly explained in the letter.[2]

The EPA General Counsel's office referred SPL's request to the Regional Counsel's office in Boston (Region I). The Regional Counsel denied the request, and SPL sued in the U.S. District Court in Massachusetts to compel EPA to produce the employee for a deposition pursuant to notice and/or a subpoena. The District Court dismissed SPL's suit, and its dismissal and refusal to reconsider were affirmed on appeal. *Appeal of Sun Pipe Line Company,* 831 F.2d 22 (1st Cir. 1987), *cert. denied,* ___ U.S. ___, 108 S.Ct. 2821 (1988).

A second EPA employee involved in the air monitoring at Newtown Crossing, Theodore Erdman, was working in Philadelphia. On June 2, 1987, counsel for SPL and Sun Company wrote to the EPA Regional Counsel in Philadelphia (Region III)

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2. In Pennsylvania courts, expert opinion testimony must be based on the witness's personal knowledge, uncontradicted facts in evidence, or an assumed state of facts reasonably shown by the record. *Kozak v. Struth,* 515 Pa. 554, 531 A.2d 420, 422 (1987). Pennsylvania courts do not follow the Federal Rules of Evidence on expert testimony. *Kozak v. Struth, supra,* 531 A.2d at 423. If a party does not prove the facts which go into hypothetical questions presented to an expert witness, the resulting opinion testimony is based on unproved assumptions and is therefore worthless guess and conjecture. *Rennekamp v. Blair,* 376 Pa. 620, 101 A.2d 669, 672-3 (1954). Thus, if Petitioners do not prove the EPA results, their expert witnesses will not be able to rely on the EPA data as a basis for their opinions. *Kozak v. Struth, supra,* 531 A.2d at 422-3.

to request permission to videotape a deposition of Erdman (App., *infra*, A-43 to A-46). This request was joined in by counsel for Davis, EAD, and Gouza. The Regional Counsel, relying on EPA regulations, 40 C.F.R. Part 2, Subpart C, §§2.401 *et seq.*, by a letter dated July 31, 1987, refused Petitioners' requests (App., *infra*, A-47 to A-48).

C. Proceedings In U.S. District Court

On August 25, 1987, Petitioners instituted the present action in the U.S. District Court for the Eastern District of Pennsylvania in Philadelphia. Petitioners alleged that the Regional Counsel's decision was judicially reviewable and that it was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, 5 U.S.C. §706(2)(A).[3] In January 1988 the parties filed a Stipulation of Facts, stipulated exhibits, and cross-motions for summary judgment. On August 30, 1988, the District Court, Hon. Louis C. Bechtle, U.S.D.J., granted Respondents' (EPA's) motion for summary judgment and denied Petitioners' cross-motion for summary judgment (App., *infra*, A-25 to A-34). The district court held that the EPA Regional Counsel's decision refusing permission to videotape a deposition of Erdman was not subject to judicial review, and even if it were, the decision was not arbitrary, capricious or an abuse of discretion within the meaning of 5 U.S.C. §706(2)(A). *Id.*

D. Proceedings In The Court Of Appeals

Petitioners brought a timely appeal. On June 27, 1989, the court of appeals (Judges Sloviter, Becker and Weis) held 3-0 that judicial review is available to review the Regional Counsel's action, refusing to allow a videotape deposition of Erdman (App., *infra*, A-1 to A-17). However, in a split decision, the court of appeals held that the Regional Counsel's action was not

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3. On October 21, 1987, during the pendency of these proceedings in the district court, counsel for SPL sent another letter to the EPA Regional Counsel asking for reconsideration (App., *infra*, A-49 to A-53). On December 18, 1987, the Regional Counsel responded and again rejected the request (App., *infra*, A-54 to A-56).

an abuse of discretion or otherwise in violation of law. *Id.* Judge Weis dissented. He would have held that the Regional Counsel's action was arbitrary and capricious and a "clear error" (App., *infra*, A-17 to A-23). In his view, EPA's refusal to allow the deposition testimony to be given "rides roughshod over one of the fundamental maxims of the law — 'the public has a right to every man's evidence.' " (App., *infra*, A-18). He considered that EPA's regulation necessarily presupposed an evaluation of the interests of justice and that the Regional Counsel's decision was so contrary to those interests that it could not be upheld:

> A critical factor in assessing the interests of justice here is that no person can provide the evidence in question other than the employee who performed the air quality measurements. This, therefore, is not a case in which the evidence is cumulative or non-essential, or available from another witness. In these circumstances, where there is but one source of material evidence, the duty to testify becomes even more compelling.
>
> The action of the EPA is, in a real sense, suppression of relevant and material evidence. Society has the right to insist that such a drastic step be supported by unassailable grounds — especially when it is a governmental agency that excludes facts from the courts. When an individual citizen has the duty to testify regardless of personal inconvenience or financial loss, surely a governmental agency, in the absence of a legitimate ground for exemption, should not be held to any lesser standard of civic responsibility. The administration of justice is poorly served when the government itself fails to set a proper example for its citizens.

(App., *infra*, A-21.)

Petitioners filed a timely petition for rehearing and rehearing in banc; it was denied on August 8, 1989 (App., *infra*, A-24).

REASONS FOR GRANTING THE PETITION

The twin holdings of the court of appeals both present issues of general and practical importance which warrant this Court's attention. The reviewability aspect of the court of appeals' decision is important for its effect respecting a great variety of agency regulations implementing the "housekeeping" statute, 5 U.S.C. § 301. Also, the second aspect of the court of appeals' decision approving by a divided vote the action of the EPA Regional Counsel foreclosing the giving of deposition testimony by an agency employee in a private civil action has very significant consequences for the administration of justice.

Whether a federal agency may foreclose the giving of factual evidence in private suits, and, if so, under what circumstances, have been "questions that [lay] near the judicial horizon" for a number of years. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 470 (1951) (Frankfurter, J., concurring). This case squarely presents those vexing and very important questions posed in *Touhy* but reserved by the Court and not answered in that case.

As a now-venerable commentary put the matter, *Touhy* did *not* decide that the housekeeping statute "confer[red] a statutory privilege or executive immunity upon department heads to withhold information in an action between private litigants. [It] decided only that the courts had subpoenaed the wrong man." Note, *Discovery From The United States In Suits Between Private Litigants — The 1958 Amendment Of The Federal Housekeeping Statute*, 69 Yale L. J. 452, 454 (1960). Nonetheless, many lower courts, including the majority in the court of appeals in this case, have acted as if *Touhy* had decided that federal agencies have great discretion to confer an immunity on their employees and thus obviate the otherwise-applicable fundamental maxim that the public has a right to every person's evidence.

Judge Weis forcefully pointed out in his dissent in the court of appeals that the duty to produce evidence in court has a very real significance and should not be easily disregarded. This Court on a number of occasions has cited with approbation and applied this basic precept to reject a range of claims of immunity

and privilege. In so doing, the Court has quoted Jeremy Bentham's poetic and vivid illustration of the principle at issue:

> "Are men of the first rank and consideration — are men high in office — men whose time is not less valuable to the public than to themselves — are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." 4 The Works of Jeremy Bentham 320-321 (J. Bowring ed. 1843).

Branzburg v. Hayes, 408 U.S. 665, 688-89 n.26 (1972); see also *Trammel v. United States*, 445 U.S. 40, 50 (1980); *United States v. Nixon*, 418 U.S. 683, 709 (1974); *United States v. Bryan*, 339 U.S. 323, 331 (1950); cf. *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)

The EPA regulations involved in this action do not on their face contravene this principle or require the result the agency reached in this case. EPA's rules are similar to regulations of other federal agencies which govern the taking of testimony of, or production of information by, agency employees in private litigation.[4] They seek to implement 5 U.S.C. § 301, the "housekeeping" statute, by requiring authorization or approval of "the General Counsel or his designee" either when voluntary testimony of an employee is requested or when an employee is subpoenaed. 40 C.F.R. §§ 2.403, 2.404(a) (App., *infra*, A-40 to

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4. *See, e.g.*, 29 C.F.R. § 2.20 *et seq.* (Department of Labor); 16 C.F.R. Part 1016 (Consumer Product Safety Commission); 24 C.F.R. §§ 15.72-15.86 (Department of Housing and Urban Development); 29 C.F.R. § 102.118 (National Labor Relations Board); 49 C.F.R. Part 835 (National Transportation Safety Board); and 10 C.F.R. § 9.200 *et seq.* (Nuclear Regulatory Commission).

A-41). The "General Counsel or his designee" is to "determine[] whether compliance with the request [or subpoena] would clearly be in the interests of EPA." *Id*

These "interests" are not sharply delineated.[5] In the district court's view, EPA's regulations seek to implement "the basic agency management directive of Section 301. [They do] not broaden or narrow that Section 301 authority." (App., *infra*, at A-33.)[6]

In any event, EPA's reference in its rules to "interests" of the government in deciding whether to allow the testimony of its employees to be taken should be construed to include consideration of the interests of justice. In this context, the interests of the government should be deemed to be the interests of the public. Indeed, Judge Weis' dissent in the court of appeals indicated that the agency's regulations presupposed that the public interests of justice were to be at the forefront of EPA's inquiry. See App., *infra*, at A-21, quoted *supra*, at 7.

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5. On the one hand, EPA's rules provide that

> [t]he purpose of this Subpart is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA.

40 C.F.R. § 2.401(c), App., *infra*, at A-40. On the other hand, in the preamble to the regulations, EPA stated:

> We recognize that there are situations where EPA should cooperate with Federal, State of local authorities as part of the Agency's joint responsibility for developing and enforcing environmental and other policies.

50 *Fed. Reg.* 32386 (Aug. 9, 1985), App., *infra*, A-37.

6. The regulations of some other federal agencies do seek to preclude entirely certain kinds of testimony. *See, e.g.*, 24 C.F.R. § 15.83 (HUD bar on expert or opinion testimony); 49 C.F.R. § 835.3 (NTSB bar on same). Some federal agency rules provide for testimony through depositions or interrogatories but prohibit employees from testifying at trial. *See* 49 C.F.R. § 835.5 (NTSB). Still other agency regulations ostensibly fail to provide any indicia or standards for determining whether an employee's testimony will be permitted to be taken. *See, e.g.*, 29 C.F.R. §§ 2.20 and 2.22 (Department of Labor). And, one agency, the Consumer Product Safety Commission, provides in its regulations that as a general rule it is contrary to the agency's policies to allow participation of its employees in private litigation. 16 C.F.R. § 1016.1.

EPA's decision, however, shows that the interests of justice were not taken into account. The evidence sought to be adduced from the agency employee who performed the air quality measurements is purely factual. App., *infra,* at A-21. It is not available from any other witness (*id.*), and it is crucial to the facts at issue in the private litigation. App., *infra,* at A-4.

That the majority in the court of appeals approved the EPA Regional Counsel's basing his decision on crabbed and illusory grounds in the face of these considerations demonstrates the need for this Court to grant review and clarify the permissible bases for an agency to bar testimony by its employees. As the majority put it, the Regional Counsel's letters denying the request to take the testimony

> expressly articulate the EPA's concern that permitting Erdman [the EPA employee] to testify as a witness for the [Petitioners] would make it appear that the agency was taking sides in the litigation, the concern that the cumulative effect of allowing such testimony would constitute a drain on EPA resources, and the conclusion that such testimony was not in the EPA's interest.

App., *infra,* at A-12. Judge Weis properly considered that these explanations were "non-reasons." *Id.* at A-23.

Rather then "taking sides," EPA's employee was to be questioned only respecting his own personal actions and measurements and the resulting data which had already been publicly reported. App., *infra,* at A-50. That one set of parties to the private case were seeking the testimony did not bear on the nature of the testimony. Relevant factual evidence may help one side more than another, but it is a fallacy to conclude from this premise that the person giving factual evidence takes the side of the party adducing the proof. EPA's expressed concern that one set of parties might be able to rely on the testimony to their advantage in the private litigation would in effect allow an agency to bar the taking of evidence from its employees in virtually every private case.

Moreover, the time needed is modest, amounting to several hours at most. App., *infra,* at A-52. The majority of the

court of appeals cited the fact that the Regional Counsel had before him "Erdman's Supervisor's letter stating that Erdman's services were necessary to help clear up a backlog of chemical plant and refinery inspections." (App., *infra*, A-5.) Yet, it is difficult to believe that in the 29 months since Petitioners first requested Erdman's deposition, the agency cannot make available two hours or half a day for that purpose. The majority's concern about the number of opt-out cases (*id.*, A-13) can be addressed by taking Erdman's testimony in the presence of all the homeowners' lawyers at one time.

The majority's concern about the cumulative effect of requests for testimony by agency employees (*id.*, A-13) is present in *every* case. EPA's regulations do not cite this concern as a factor to be considered, but it nonetheless could become pertinent in an extreme case.

The fact that EPA Region III has never allowed any testimony in private litigation since EPA's regulations were first promulgated (*id.*, A-16) simply shows how far that Region has strayed from the fundamental principle that the public is entitled to every man's evidence. There is no indication that other EPA regional offices have been paralyzed or even hampered by allowing testimony in situations comparable to the present one. In all events, a concern over the potential for abusive or unduly burdensome requests can be addressed in abusive or unduly burdensome cases. Otherwise, the general rule prescribing a duty to give evidence will be elided completely by the derogations from it. See 8 J. Wigmore, *Evidence* § 2192, at 70 (J. McNaughten rev. ed. 1961).

The question of the grounds upon which a federal agency may bar its employees from testifying in private litigation is increasingly important to the administration of justice. If the chief question presented was of consequence in 1951 when *United States ex rel. Touhy v. Ragen*, *supra*, was decided, it is significantly more important today. EPA, for example, did not exist until 1970, and its activities now extend broadly into the day-by-day commerce and activity of many persons, including individual homeowners, as this case illustrates. That activity has an important bearing on private dispute resolution. As the court

of appeals noted, "in the first two years after its regulations were promulgated [1985-1987], EPA received seventy-one requests or subpoenas for testimony in private litigation and granted permission in only twenty-five (35.2% of the cases)." App., *infra*, A-16. When such requests to other agencies are also taken into account, the significance of the questions in this case to the administration of justice becomes evident.

CONCLUSION

It is unconscionable that in an American court of law, relevant factual and non-privileged testimonial evidence cannot be adduced by the litigants because a federal agency chooses to refuse to allow its employees to provide it. The court of appeals' decision sanctioning an EPA Regional Counsel's decision to forestall testimony in the circumstances of this case is an extreme departure from the fundamental precept that the public is entitled to every person's evidence. This case squarely presents an increasingly important question affecting the administration of justice. The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 6, 1989

APPENDIX

Filed: June 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1821

DAVIS ENTERPRISES, SUN PIPE LINE COMPANY, SUN COMPANY, INC., E. A. DESIGN, LTD., JAN GOUZA, PICKERING, CORTS & SUMMERSON,

Appellants

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and BRUCE DIAMOND

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 87-5315)

Argued February 6, 1989

Before: SLOVITER, BECKER, and WEIS,
Circuit Judges

(Opinion filed June 27, 1989)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

The appellants before us, Davis Enterprises *et al.*, who are the defendants in private civil litigation, sought permission from the Environmental Protection Agency (EPA) to take the deposition of an agency employee as a fact witness for use in refuting damage claims brought by homeowners as a result of a gasoline spill. The EPA refused, and Davis Enterprises *et al.* filed suit. The district court, on the basis of a stipulation as to the relevant facts, granted summary judgment for the EPA, holding that the EPA's decision was unreviewable and, alternatively, that even if the decision were reviewable, the EPA did not abuse its discretion.

II.

This appeal arose as a byproduct of litigation over liability for an underground gasoline spill in Newtown, Pennsylvania. A contractor installing underground television cable punctured an underground petroleum pipeline owned and operated by one of the Appellants before us. Unleaded gasoline leaked from the puncture, and gasoline vapors entered the basements of homes in a nearby housing development. The homeowners filed a class action in a Pennsylvania state court. Homeowners who opted out of the class action have filed individual suits against Appellants, which are still pending. In the class action, the liability and damages phases were bifurcated, and Appellants were found liable for causing the spill. The state litigation is now in the damage phase, in which the homeowners must establish their individual damages.

After the incident, the homeowners, not wanting to rely on air quality tests performed at the behest of

defendant Sun Pipe Line Company (the owner of the pipeline), requested independent testing through the Pennsylvania Department of Health (DOH). The DOH arranged to have the tests performed by the EPA, and Theodore Erdman was one of the EPA employees who participated in the EPA's air monitoring process.

Appellants, who allege that the results of the EPA testing are favorable to their position that the homeowners suffered little or no damage, seek Erdman's testimony for use at trial on the homeowners' individual damages. They have received the results of the EPA's air monitoring in documentary form, but they claim that Erdman's testimony is necessary because the homeowners have refused to admit the truthfulness of the EPA results without the opportunity to cross-examine Erdman. Appellants assert the concern that the test results may not be admissible under the Pennsylvania law of evidence in light of the homeowners' objections.

It is not our function on this appeal to decide whether the EPA's reports are or are not admissible under Pennsylvania law absent Erdman's testimony. Appellants represented to us at oral argument that they requested an *in limine* ruling on the admissibility of the EPA data from the Pennsylvania trial court, but that court refused to make such a ruling. Of course, that determination, if favorable to Appellants, would have made this tangential federal litigation unnecessary and would have spared all parties the delay attendant to the federal courts' determination of the issue before us on appeal. For purposes of this appeal, we accept Appellants' representation that if they are unable to have the EPA results admitted, it could hamper their own experts' attempts to prove that the spill did not cause damage to the homeowners or their property because Pennsylvania law requires that expert opinion

testimony be based on facts admitted in evidence. *See Murray v. Siegal*, 413 Pa. 23, 195 A.2d 790 (1963).

Several times Appellants sought permission from the EPA to take a videotape deposition of Erdman at his office which any interested homeowner could attend. In denying the request, the EPA's Regional Counsel (Region III) Bruce Diamond, referring to the applicable EPA regulations governing such requests, 40 C.F.R. § 2.401 *et seq.* (1988), advised Appellants that he had determined that allowing the testimony was not clearly in the EPA's interest, that the EPA would appear to be taking sides in a litigation in which it was not a party, and that the cumulative effect of granting such requests could have an impact on the agency's resources. In making this decision, the EPA's Regional Counsel had before him Erdman's supervisor's letter stating that Erdman's services were necessary to help clear up a backlog of chemical plant and refinery inspections. The EPA did offer to have Erdman submit an affidavit in lieu of his requested testimony, but this was not satisfactory to Appellants because it would not provide the homeowners with the desired opportunity for cross-examination, and the concomitant assurance of the admissibility of the report.

Appellants made a similar request for the testimony of an EPA employee from Region I who was also involved in the monitoring process at issue. This request was denied in Region I, and litigation seeking to compel the EPA to produce the employee was unsuccessful. *See Appeal of Sun Pipeline Co.*, 831 F.2d 22 (1st Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).[1]

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1. In *Sun Pipeline*, Appellants raised the issues which they have raised here only on motion for reconsideration. The First Circuit upheld the district court's denial of the motion for reconsideration on the ground that appellants there had

Following the EPA's refusal to permit the Erdman deposition, Appellants brought suit against the EPA and Diamond in the United States District Court for the Eastern District of Pennsylvania, alleging that the EPA's decision refusing to permit the requested deposition was invalid as an abuse of its discretion. The parties stipulated the facts and the case was decided on cross motions for summary judgment. The district court concluded that judicial review was "not available pursuant to 5 U.S.C. § 701(a)(2)." App. at 252. It held further that even if judicial review were available, "the EPA's decision . . . was not arbitrary, capricious or an abuse of discretion and was rationally connected to the facts and in accordance with law." *Id.* Our scope of review of the district court's decisions on both issues is plenary.

III.

We consider first the EPA's contention that the decision to prohibit Appellants from deposing Erdman during working hours is not reviewable. Appellants have not challenged the validity of the EPA's power to promulgate regulations which grant the agency discretion to determine whether to comply with subpoenas or requests for employee testimony in private litigation. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (sustaining Attorney General's power to issue order governing protection of department's records in response to subpoena).

The EPA's authority to govern its internal affairs is derived from 5 U.S.C. § 301, which provides that:

> The head of an Executive department or military department may prescribe regulations for

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attempted to use the motion for reconsideration to change their theory of the case, and because they had not complied with the EPA procedure for requesting such testimony. 831 F.2d at 25. The court thus did not address the merits of the arguments raised here. *Id.*

> the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301 (1982).

Pursuant to this statutory provision, the EPA has promulgated regulations governing the testimony of its employees in private suits. When voluntary testimony of an employee is sought, the regulations provide that:

> A request for testimony by an EPA employee under § 2.402(b) must be in writing and must state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA. Such requests are immediately sent to the General Counsel or his designee . . . [who] determines whether compliance with the request would clearly be in the interests of EPA and responds as soon as practicable.

40 C.F.R. § 2.403 (1988).

The purpose of the EPA regulations on this subject is "to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes, and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA." 40 C.F.R. § 2.401(c) (1988).

Although review of agency actions is generally available to "person[s] suffering legal wrong because of agency action" pursuant to 5 U.S.C. § 702 (1982), the EPA contends that a statutory exception to the general rule of reviewability applies to the decision not to

permit testimony of an EPA employee. It relies on 5 U.S.C. § 701(a) which contains statutory exceptions to reviewability of agency action. Section 701(a) provides that:

> (a) This chapter applies, according to the provisions thereof, except to the extent that--
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a) (1982).

The EPA contends that the section 701(a)(2) exception to reviewability is applicable here because the EPA's statutory authority under 5 U.S.C. § 301 to regulate the conduct of its employees gives it unlimited discretion in such matters.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), the Supreme Court interpreted section 701(a)(2) as establishing a broad presumption in favor of reviewability, holding that the exception applied only when there is no law to apply. Thus, the Court held that a statutory provision prohibiting the Secretary of Transportation from authorizing federal aid to construct a highway through a public park unless there was "no feasible and prudent alternative" provided law on which judicial review could be based. *Id.* at 410-13.

More recently, the Court, in holding that the FDA's refusal to take enforcement actions against states that used drugs not approved for use in human executions to inflict capital punishment by lethal injection was not reviewable, attempted to harmonize section 701(a)(2) making unreviewable action committed to agency discretion by law with the abuse of discretion standard of review embodied in section 706(2)(A). *See Heckler v. Chaney*, 470 U.S. 821

(1985). It stated, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830. We have interpreted *Chaney* as not changing the presumption of reviewability of agency action under the APA. *See Chong v. Director, United States Information Agency*, 821 F.2d 171, 175 n.3 (3d Cir. 1987).

Appellants point to the criteria specified in the regulations for allowing the testimony in arguing that there is law to be applied by a reviewing court. The EPA on the other hand contends that 5 U.S.C. § 301 provides unfettered discretion on matters pertaining to control of its employees, that the regulations do no more than provide a non-exclusive set of factors to be considered in making decisions as to whether to permit employee testimony in a given case, and that a reviewing court has no legal standard to apply. Thus, argues the EPA, the exception in 5 U.S.C. § 701(a)(2) is met.

This court in *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3d Cir. 1979), set forth the analytical framework to be followed before the court may determine that an agency decision is unreviewable under section 701(a)(2). To so hold, we must consider whether: 1) the action involves broad discretion, not just the limited discretion inherent in every agency action, *id.* at 578; 2) the action is the product of political, military, economic, or managerial choices that are not readily subject to judicial review, *id.* at 579; and 3) the action does not involve charges that the agency lacked jurisdiction, that the decision was motivated by impermissible influences such as bribery or fraud, or that the decision violates a constitutional, statutory, or regulatory command, *id.* at 580. Applying these criteria in that case we held that the army's decision to contract out stevedoring

services to a private concern was not reviewable. We focused primarily on the absence of fixed statutory or regulatory standards, and secondarily on the fact that the decision as to how to utilize army resources was particularly within the army's expertise. *Id.* at 580-83.

We have, however, held that when agency regulations or internal policies provide sufficient guidance to make possible federal review under an abuse of discretion standard, agency decisions are not unreviewable, even absent express statutory limits on agency discretion. In *Chong*, we had before us United States Information Agency regulations covering waiver of the two-year foreign residency requirement for exchange visitors seeking to apply for permanent residency status. We held that because these regulations required the agency to "review the policy, program, and foreign relations aspects of the case" and "transmit a recommendation to the Attorney General for decision," 22 C.F.R. 514.32, they provided sufficient guidance to reviewing courts and were therefore reviewable. *Chong*, 821 F.2d at 175-76; *see also Hondros v. United States Civil Service Comm'n*, 720 F.2d 278, 294 (3d Cir. 1983) (official memorandum from Marshal's Office stating that the Office would utilize Civil Service certification procedure in making certain hiring decisions constituted policy, and thus the administration of such policy could be reviewed under an arbitrary, capricious, or abuse of discretion standard).

This case is comparable to *Chong*, where the regulations did not state a legal standard but merely listed the factors the agency must consider in reaching a decision. The EPA regulations require the agency to consider whether allowing an employee to testify in a given case is in the agency's interest, *see* 40 C.F.R. § 2.403, and specify a number of relevant factors, *i.e.* the appearance of taking sides and the

effect on agency resources, *see* 40 C.F.R. § 2.401(c). Once the agency has articulated factors to be considered in deciding requests for employee testimony, the agency effectively has limited its own discretion and would not be free to make a decision based exclusively on factors not contained in the regulations. *See Service v. Dulles*, 354 U.S. 363, 388 (1957).

The EPA argues that under the second *Local 2855* criterion the factors identified in the regulations involve political, managerial, and economic concerns that are not susceptible to meaningful judicial review. Although some factors do trench on managerial concerns, we do not believe that the factors enumerated in the regulations, taken as a whole, are so devoid of objective benchmarks as to make them unreviewable. We thus conclude, as in *Chong*, that there is sufficient law to apply to make the agency action reviewable.

IV.

We turn then to the merits of the EPA's decision to reject Appellants' request for Erdman's deposition testimony. We note that after the argument in this case the Fourth Circuit sustained the EPA's right to prevent the testimony of an EPA employee pursuant to a state court subpoena. *See Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989). Although in *Boron*, unlike here, the EPA relied on a sovereign immunity theory and that was the basis for the court's decision, we nonetheless find that opinion instructive. In addition, there are, as the *Boron* court stated, numerous cases in which the courts have held that a federal employee may not be compelled to obey a subpoena contrary to the agency's instructions under valid agency regulations. *See, e.g., Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986); *Giza v. Department of*

Health Education & Welfare, 628 F.2d 748 (1st Cir. 1980). In any event, the issue as framed by the parties before us is whether the agency's decision was arbitrary, capricious, or an abuse of discretion, *see* 5 U.S.C. § 706(2)(A) (1982); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam), and whether it was rationally connected to the facts and in accordance with the law, *see Shane Meat Co. v. United States Department of Defense*, 800 F.2d 334, 336 (3d Cir. 1986).

Chong counsels that where the regulations which provide the governing law vest the agency with "rather broad discretion," our scope of review is "severely limited." *Chong*, 821 F.2d at 176. We are only free to determine whether the agency followed its own guidelines or committed a clear error of judgment. *See Overton Park*, 401 U.S. at 416.

The record makes clear that the EPA recognized and considered the factors set forth in 40 C.F.R. § 2.401(c) in making its decision. Both of the EPA's letters denying Appellants' request expressly articulate the EPA's concern that permitting Erdman to testify as a witness for the Appellants would make it appear that the agency was taking sides in the litigation, the concern that the cumulative effect of allowing such testimony would constitute a drain on EPA resources, and the conclusion that such testimony was not in the EPA's interest. In essence, Appellants' argument that EPA did not follow its own regulatory criteria reduces to the argument that they do not agree with the EPA's decision. While we may not have made the same decision as the EPA did, we are not free to substitute our judgment for that of the agency on this issue. *See Overton Park*, 401 U.S. at 416.

Although it is certainly arguable that permitting Erdman to give a deposition based on facts within his knowledge would not create the appearance of taking

sides, the EPA's conclusion to the contrary is not capricious. It is important to note that EPA has not withheld relevant information as to the test results. The parties were given the information in written form and the EPA agreed to provide Erdman's testimony in the form of an affidavit. For strategic reasons, the Appellants, defendants in the private litigation, seek to introduce the EPA reports and the private plaintiffs oppose the introduction. The EPA's decision that if it assists Appellants in their trial tactics it would appear to be taking sides is thus not irrational.

Similarly, Appellants have not shown that the agency's judgment that the potential cumulative impact of granting such requests would constitute a drain on the agency's resources is arbitrary. Notwithstanding Appellants' argument that Erdman's deposition, which they have volunteered to take at his office, would only take a minimal amount of time, there is no guarantee that cross-examination would not be lengthy. In addition to the class action suit, there are pending suits by opt-out class members against whom Appellants would also want to use Erdman's testimony and who therefore might also be entitled to cross-examination.[2] Moreover, Appellants' argument about the minimal burden in this case fails to take into account the EPA's legitimate concern with the potential cumulative effect of granting such requests. EPA argues that private litigation follows each environmental issue. Its concern about the effects of proliferation of testimony by its employees is within the penumbra of reasonable judgmental decisions it may make.

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2. The class as originally certified was composed of 200 homeowners. The record before us does not show how many members of the class assert damage claims or the number of suits filed by opt-out class members.

Nor can we say that the EPA abused its discretion in determining that Erdman's testimony would not be in its interest. The EPA has defined its interest as the efficient use of the resources allotted to it, which the regulations explain encompasses considerations such as use of the employee's time "only for official purposes" and ensuring "that public funds are not used for private purposes." *Id.* § 2.401(c). EPA's public mission is that of "developing and enforcing environmental standards and other policies." 50 Fed. Reg. 32386 (Aug. 9, 1985).

The EPA could reasonably anticipate that its employees would be the subject of frequent requests for testimony arising from such duties. As the Fourth Circuit stated in *Boron Oil*, the EPA "has a valid and compelling interest in keeping its On-Scene Coordinators, as a class, free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest." *Boron Oil*, 873 F.2d at 71. The regulation permits the EPA to withhold permission for employee testimony when the information which is the subject of such inquiry was acquired in the course of the employee's performance of official duties or because of the employee's official status. *See* 40 C.F.R. § 2.401. Thus, it does not cover the employee's testimony on facts acquired as a private citizen, which is consistent with the general obligation of citizens to provide testimony.[3] Moreover, the regulations do not

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3. Although the regulations do not apply "[w]here employees provide expert witness services as approved outside activities," 40 C.F.R. § 2.401(b)(3), the EPA has taken the position that Erdman's testimony pursuant thereto would be inconsistent with the regulation that prohibits actions which "would result in or create the reasonable appearance of . . . [u]sing public office for private gain." 40 C.F.R. § 3.103(d) (1988). The validity of the EPA's interpretation in this respect is not before us.

apply when the EPA is a party, and thus they make no attempt to shield EPA employees from discovery in such situations.

Even when the EPA is not a party, the regulations distinguish between the testimony of an EPA employee when requested by another federal agency, or local or state legislative or executive body, *see* 40 C.F.R. § 2.402(a), and such testimony when requested in private litigation, *see id.* § 2.402(b). Appellants do not challenge the rationality of such a distinction.

We do not gainsay that there is a generalized public interest in having public employees cooperate in the truth seeking process by providing testimony useful in litigation. While, as we have stressed, it is not likely that we would have interpreted the EPA's interests as narrowly as it has done here, we cannot say that it abused its discretion in deciding that its interest in having the time of its employees (and therefore taxpayers' money) spent on agency business outweighed the interests of Appellants in having the EPA reports admitted into evidence in private litigation to which the EPA was not a party.[4]

The Appellants also argue that the EPA abused its discretion because it departed from its established policy of granting requests for employee testimony in similar private ligitation. Appellants base their argument on their analysis of EPA documents concerning requests for testimony in other cases which the EPA furnished to Appellants pursuant to a request under the Freedom of Information Act. Assuming without deciding that such an inquiry is appropriate under our severely limited scope of review, we conclude that Appellants' argument must fail.

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4. We emphasize that, of course, the EPA monitoring results may in fact be admissible in the Pennsylvania damage actions, even without Erdman's testimony.

A review of the agency decisions and the statistics concerning the EPA's treatment of requests for testimony in private litigation cited by Appellants does not establish that there is a policy to grant employees the right to testify as factual witness in such cases. In many of the cases cited by Appellants, the EPA clearly articulated t! e reason that allowance of such testimony was in its interest, such as, defending the agency's reputation against charges of delay or misconduct in handling matters at issue in the litigation. The fact that the deciding officer in another region may have on a few occasions granted permission to an employee to testify in private litigation under circumstances that are arguably similar to those involved here is entirely consistent with the discretionary nature of the decision in question.

Furthermore, the statistics referred to by the Appellants reveal that in the first two years after the regulations were promulgated, the EPA received seventy-one requests or subpoenas for testimony in private litigation and granted permission in only twenty-five (35.2% of the cases). EPA Region III, the region involved in this case, received eight requests during that period and granted none. The statistics suggest a nationwide tendency to deny such requests, and reveal a consistent regionwide policy to deny them. Appellants have thus failed to show that EPA's decision to deny the deposition in this case was such a deviation from its usual procedure as to constitute an abuse of discretion.

V.

In summary, we reject the district court's conclusion that the EPA's determination is unreviewable. Nonetheless, we conclude, as did the district court in its alternative holding, that the EPA

did not abuse its discretion or otherwise err in preventing Erdman from using agency time to give deposition testimony on Appellants' behalf in private litigation.

This appeal raises no challenge to the EPA's authority to promulgate the regulation governing use of its employees' time, and its decision in this case falls within the parameters of the agency's discretion as set forth in the applicable statute and regulations. For the foregoing reasons, we will affirm the judgment of the district court.

WEIS, *Circuit Judge, Dissenting.*

I agree with the majority that the EPA's action here is subject to review by the courts. I dissent, however, from the holding that the agency's action was not arbitrary and capricious.

The right of a governmental agency to withhold information and testimony from judicial proceedings is a controversial matter that is far from settled. The decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), is sometimes cited for the proposition that an agency head is free to withhold evidence from a court. But the Supreme Court in *Touhy* specifically refused to reach that question.[1] *Id.*

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1. Justice Frankfurter emphasized this point, writing in concurrence.

> "[T]he decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached."

Touhy, 340 U.S. at 472 (Frankfurter, J., concurring).

at 467. The Court held that a Justice Department official acting on orders of the Attorney General could not be held in contempt for failing to produce records. In effect, the Court created what might be termed a type of immunity for the subordinate official who otherwise would be caught in the unpleasant dilemma of refusing to obey either an order of his superior or one issued by a court. In the end, the Court concluded that the wrong person had been subpoenaed.

Touhy immunity for a subordinate was the controlling issue in cases where the governmental agency was not a party, such as *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986), and *Smith v. C.R.C. Builders Co.*, 626 F. Supp. 12 (D. Colo. 1983). In the present case, by contrast, the issue of whether the EPA properly refused to permit its employee to testify is squarely before us.[2]

The action of the EPA in this instance rides roughshod over one of the fundamental maxims of the law -- "the public has a right to every man's evidence." The Supreme Court has on numerous occasions reiterated Lord Hardwicke's articulation of that long-standing common law precept. *E.g.*, *Trammel v. United States*, 445 U.S. 40, 50 (1980); *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v.*

For a discussion of the limited reach of the *Touhy* decision, see Note, *Discovery from the United States in Suits Between Private Litigants -- The 1958 Amendment of the Federal Housekeeping Statute*, 69 Yale L.J. 452 (1960).

2. The issue arose peripherally in *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989), which involved a suit to compel an EPA On-Scene Coordinator to obey a subpoena in a civil action in state court. There, the Court of Appeals, relying on *Touhy* immunity, held that the district court erred in ordering the agency employee to testify. The Court in *Boron Oil* referred to the doctrine of sovereign immunity in reaching its decision, but that issue is not before us here.

Bryan, 339 U.S. 323, 331 (1950). Declining to even mention this basic tenet, the agency asserts that its own self-serving regulation grants the right to withhold testimony unless the EPA in its unreviewable discretion determines that granting permission "would clearly be in the interests of EPA." 40 C.F.R. § 2.403.

Plaintiffs did not contest the validity or breadth of this regulation in the district court, and precedents of our Court bar consideration of an issue not presented to the trial judge in the first instance. *E.g.*, *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 628, 639 (3d Cir. 1982) (in banc) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)), *cert. denied*, 465 U.S. 1038 (1984); *Caisson Corp. v. Ingersoll-Rand Co.*, 622 F.2d 672, 680 (3d Cir. 1980); *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976). Therefore, our review is limited to whether, assuming the regulation to be valid, the agency's action was proper. I will not lengthen the discussion here by taking issue with the majority's application of the arbitrary and capricious standard of review, because even allowing the EPA broad discretion, the decision should not stand.

The determination of whether a given agency action is arbitrary or capricious may not take place in a vacuum -- the facts and general principles of law must be considered. Differing circumstances can excuse conduct in some instances and fault it in others.

In *Branzburg*, the Court noted Bentham's famous exposition of the duty to produce evidence in court. Because his words are pertinent here, they bear repeating:

> "Are men of the first rank and consideration -- are men high in office -- men whose time is not less valuable to the public than to themselves -- are

> such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, any the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

Branzburg, 408 U.S. at 688 n.26 (quoting 4 *The Works of Jeremy Bentham* 320-21 (J. Bowring ed. 1843)).

Professor Wigmore was emphatic in his support for the obligation. He wrote that society has the right to the testimony because the demand comes from "the community as a whole -- from justice as an institution and from law and order as indispensable elements of civilized life." 8 J. Wigmore, *Evidence* § 2192, at 73 (J. McNaughton rev. ed. 1961). The particular cause before the court may be "petty and personal, but the results that hang upon it are universal. . . . The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but the community at large and forever." *Id.*

Like most general maxims, there are exemptions from the duty to testify. Such examples as national security, self-incrimination, and business secrets come to mind. But no such considerations are present here. The EPA does not -- indeed, could not -- contend that the information sought here by way of testimony is privileged.

The curious feature of this case is that the data have already been disclosed to the parties, but, on the present state of the record, cannot be submitted to the jury in the state court except through the process of direct and cross-examination of the EPA employee. The EPA's actions are paradoxical -- it willingly directed an employee to perform air monitoring tests at the site of the pipeline rupture and disclose the results to the litigants, but now blocks presentation of the facts to a court of law.

A critical factor in assessing the interests of justice here is that no person can provide the evidence in question other than the employee who performed the air quality measurements. This, therefore, is not a case in which the evidence is cumulative or non-essential, or available from another witness. In these circumstances, where there is but one source of material evidence, the duty to testify becomes even more compelling.

The action of the EPA is, in a real sense, suppression of relevant and material evidence. Society has the right to insist that such a drastic step be supported by unassailable grounds -- especially when it is a governmental agency that excludes facts from the courts. When an individual citizen has the duty to testify regardless of personal inconvenience or financial loss, surely a governmental agency, in the absence of a legitimate ground for exemption, should not be held to any lesser standard of civic responsibility. The administration of justice is poorly served when the government itself fails to set a proper example for its citizens.

Whether an agency's decision was arbitrary and capricious is judged by the standards set out in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). There, the Court explained that action is unacceptable under this level of review

> "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Id. at 43.

In denying the plaintiffs' request, the EPA maintained that the testimony "would add nothing to our public mission and could be seen as taking sides in the litigation." Letter from Regional Counsel to Attorney for Sun Pipe Line Company (July 31, 1987). Moreover, "while the amount of time which this particular exercise might take may be small, the precedent it sets and the future cumulative effect of similar requests could have a significant impact on the Agency's resources." *Id.* The agency further declared that "if an employee is to testify, the testimony must further EPA's mission." *Id.*

These "explanations" arguably fail all of the criteria the Supreme Court used to determine whether an agency action is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. It is enough for me, however, that the agency's reasons completely disregard the obligation of citizens and governmental agencies to present evidence in furtherance of the proper administration of justice. It is curious indeed that the EPA's concern about establishing a troublesome precedent ignores, as it does, a valued legal principle of several centuries standing.

Although it professes a desire to be impartial by suppressing evidence, the EPA is, in reality, taking sides. To withhold testimony that may be helpful to one side is to favor the other, but more importantly for

society, is to prejudice proper resolution of the litigation. Accepting the proposition that testifying would inappropriately create the appearance of taking sides nullifies the duty to provide evidence.

Conceivably, if providing testimony requires an undue diversion of an agency's resources, some accommodation might be necessary. But that is not a factor here. The proposal to take a one-time deposition in the EPA office rather than to have the witness present in court will reduce the time required, and will make the evidence usable in more than one case. Obviously, this procedure amounts to a substantial saving of time and shows due consideration for conserving EPA's finite resources. Any diversion -- if indeed it be that -- is *de minimis* here. Thus, the agency's explanations for withholding evidence may charitably be described as "non-reasons." As a result, I must conclude that the EPA committed a clear error of judgment that requires us to reverse its decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The action of the EPA was arbitrary and capricious, and I would require it to permit its employee to testify at the deposition as requested.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1821

DAVIS ENTERPRISES, SUN PIPE LINE COMPANY,
SUN COMPANY, INC., E.A. DESIGN, LT.,
JAN GOUZA, PICKERING, CORTS & SUMMERSON,
Appellants

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and BRUCE DIAMOND

SUR PETITION FOR REHEARING

Present: Gibbons, *Chief Judge*, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard and Weis,* *Circuit Judges*

The petition for rehearing filed by Appellants, Davis Enterprises, et al. in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: Aug. 8, 1989

* Hon. Joseph E. Weis, Jr., Senior Circuit Judge, as to panel rehearing only.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVIS ENTERPRISES, SUN PIPE LINE COMPANY, SUN COMPANY, INC., E.A. DESIGN, LTD., JAN GOUZA, and PICKERING, CORTS & SUMMERSON, INC.	:	CIVIL ACTION
V.	:	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and BRUCE DIAMOND	:	NO. 87-5315

MEMORANDUM AND ORDER

BECHTLE, J. AUGUST 30, 1988

Presently before the court are the parties' cross-motions for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons stated herein, plaintiffs' motion for summary judgment will be denied and defendants' motion for summary judgment will be granted.

I. BACKGROUND

In this action the six plaintiffs ((1) Davis Enterprises ("Davis"); (2) Sun Pipe Line Company ("SPL"); (3) Sun Company, Inc.; (4) E.A. Design, Ltd.; (5) Jan Gouza; and, (6) Pickering, Corts & Summerson) (hereinafter collectively referred to as "plaintiffs")) have sued defendants United States Environmental Protection Agency ("EPA") and Bruce Diamond (Regional Counsel for the EPA's Region III) seeking judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §701, *et seq.*, of the decision by the EPA not to allow

plaintiffs to take the videotape deposition of an EPA employee, Theodore Erdman ("Erdman"), pursuant to 40 C.F.R. §2.401, *et seq*. Plaintiffs sought to depose Erdman for use in other litigation in state court to which the EPA is not a party and in which the plaintiffs in the instant action are all defendants. On January 8, 1988, the parties in this action submitted a joint stipulation of facts which indicates that the pertinent facts which precipitated the state court action are as follows. On November 12, 1982, a contractor, Tri-State Telecommunications, Inc. ("Tri-State"), installing underground television cable near Newtown, Pennsylvania, punctured an underground petroleum pipeline which runs from Marcus Hook, Pennsylvania, to Newark, New Jersey, and is owned and operated by SPL. This puncture resulted in the release of approximately 50,000 gallons of unleaded gasoline. As a result, gasoline vapors entered the basements of a number of homes in an adjacent housing development known as Newtown Crossing. Various investigations of the situation were made, including one by the EPA at the request of Mr. Gary Schultz of the Pennsylvania Department of Health ("PDH"). On March 25, and April 6, 7, and 25, 1983, EPA Region III employee Erdman conducted air monitoring tests with a portable gas chromatography machine and Tenax tubes to ascertain the level of hydrocarbons (including, specifically, benzene, toluene and xylene) and other compounds in several nearby homes. The EPA issued the results of this monitoring in the form of three letters from Erdman to Mr. Gary Schultz at the PDH. The air monitoring arose out of requests by certain homeowners to the PDH to have an independent agency do testing to obtain unbiased results regarding the levels of hydrocarbons in their homes and by the PDH, in turn, requesting the EPA to do the monitoring. Plaintiffs note that the testing by the EPA was not done pursuant to any regulatory program the EPA was then enforcing and the EPA data which resulted from the tests were used by the Centers for Disease Control, the PDH, and the Bucks County Department of Health to develop health and/or evacuation criteria regarding exposure to gasoline vapors.

Various lawsuits relating to the pipeline rupture and the resulting contamination of the nearby homes have been filed in the Court of Common Pleas of Bucks County, Pennsylvania, in which the plaintiffs herein are defendants. Again, the EPA is not a party to any of that litigation. On or about May 18, 1983, the case of *Pier Cipriani, et al. v. Sun Pipe Line Company, et al.*, No. 83-03557-11-2, was filed in the Court of Common Pleas of Bucks County, Pennsylvania. The *Cipriani* case is a class action with name families acting as the class representatives and named as plaintiffs. The complaint alleges, *inter alia*, property damage and various adverse health effects suffered by the homeowners in Newtown Crossing. Co-defendants in that state court action include Tri-State (the television cable installation contractor whose employees punctured the gasoline pipeline), and Davis (a partnership and the holder of the cable television franchise for Newtown Township). Additional defendants added later include E.A. Design, Ltd. (the preparer of the maps which omitted the gasoline pipeline), Jan Gouza (the Township Engineer), and Pickering, Corts & Summerson, Inc. (Jan Gouza's firm).

Beginning in February, 1984, numerous cases were filed in the Court of Common Pleas of Bucks County, Pennsylvania, by plaintiffs who opted-out of the *Cipriani* class action suit. Sun Company, Inc., the parent of SPL in 1982, is also a defendant in some of these cases filed by opt-out plaintiffs. These suits are similar to the *Cipriani* action in that the plaintiffs are alleging property damage and adverse health effects due to the gasoline pipeline accident.

On February 21, 1985, the Court of Common Pleas of Bucks County, Pennsylvania, certified a class consisting of approximately 200 homeowners in the *Cipriani* action as to common issues of fact on liability, but it held that each plaintiff would have to prove damages individually. In September and October, 1986, a trial on liability only was held in the *Cipriani* action. The jury found SPL, David, E.A. Design, Ltd., Jan Gouza and his firm, Pickering, Corts & Summerson, Inc., and Tri-State to be causally negligent for the pipeline accident under comparative negligence principles.

After the jury verdict on liability, trial preparation began on the homeowners' damage claims. Plaintiffs herein wish to have admitted in their Bucks County litigation the results of EPA's monitoring and have requested the deposition of Erdman, in part because their opponents (the homeowners) in the Bucks County litigation will not stipulate to the admissibility of the EPA test results. The homeowner plaintiffs have refused to admit the truth of the EPA test results without first having an opportunity to cross-examine the EPA personnel who did the testing work.

Plaintiffs herein formally requested that the EPA allow the Erdman videotape deposition by letter dated June 2, 1987.[1] Plaintiffs repeated their request by letters dated June 8 through June 16, 1987. The EPA reviewed the requests for Erdman's deposition pursuant to the regulations governing discovery of EPA employees in cases where EPA is not a party. 40 C.F.R. §2.401, *et seq*. On June 31, 1987, EPA Regional Counsel Bruce Diamond sent a letter refusing plaintiffs' requests and informing plaintiffs that the guidelines set forth in those regulations were

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1. Previously, on April 3, 1987, SPL directed a written request to the EPA General Counsel in Washington, D.C., to permit a videotape deposition of Dr. Thomas Spittler, an EPA Region I employee involved in the Newtown, Pennsylvania, air sampling project. On April 29, 1987, SPL filed suit in the United States District Court for the District of Massachusetts to compel Dr. Spittler's attendance at a deposition. In a bench ruling on April 30, 1987, the district court dismissed the suit under authority of *Giza v. Secretary of HEW*, 628 F.2d 748, 751-52 (1st Cir. 1980). (The court in *Giza* held that the federal courts could not compel testimony by Food and Drug Administration employees pursuant to a deposition request on the basis of the Freedom of Information Act, mandamus jurisdiction comity, or the Full Faith and Credit Clause of the Constitution.) SPL moved for reconsideration on May 6, 1987, and on May 8, 1987, the motion for reconsideration was denied. The United States Court of Appeals for the First Circuit affirmed the dismissal on grounds that there was no abuse of discretion in denying the motion to reconsider. *Appeal of Sun Pipe Line Co.* 831 F.2d 22 (1st Cir. 1987) (the three judge panel included Third Circuit Judge Leonard I. Garth, sitting by designation). On October 30, 1987, SPL filed a petition for rehearing before the original panel and rehearing *en banc* on October 30, 1987, and that petition was denied on November 20, 1987. SPL filed a petition for a writ of certiorari which was denied on June 13, 1988.

not met by the requested deposition since, *inter alia*, the testimony requested would not clearly be in the interest of the EPA and allowing the deposition could appear to be taking sides in the Bucks County litigation, and allowing the deposition might set a precedent that would force the EPA to honor future similar requests that, cumulatively, could have a negative impact on the EPA's resources. EPA did, however, offer to provide the requested deposition testimony in the form of an affidavit.

This lawsuit was filed on August 25, 1987, seeking judicial review of the EPA's refusal. By letter dated October 21, 1987, SPL renewed its request for the deposition of Erdman and stated that the affidavit offered would be insufficient given their Bucks County homeowners opponents' desire to cross-examine the witness. On December 18, 1987, the EPA responded by letter to the issues raised by plaintiffs in their renewed request, finding no new facts to change the EPA's decision not to allow the deposition testimony.

Plaintiffs contend (1) that defendants' decision not to allow Erdman to testify at a deposition is judicially reviewable under the APA and, (2) that defendants' conduct was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law within the meaning of 5 U.S.C. §702(2)(A). Defendants contend that plaintiffs' complaint should be dismissed because the EPA decision not to allow the Erdman deposition testimony is not judicially reviewable under the APA pursuant to 5 U.S.C. §701(a)(2) and even if it is, the decision was not arbitrary and capricious, but was reasonable under the circumstances, was in accordance with applicable regulations concerning agency employees' testimony in third party litigation, that EPA considered all relevant factors, and gave each factor the appropriate weight under those regulations.

II. DISCUSSION

Federal judicial review of agency actions in applying federal law is available under 28 U.S.C. §1331. *Califano v. Sanders*, 430 U.S. 99, 104-107 (1976); *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979); *Jaffee v. United States*, 592 F.2d 712, 718-719 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *Sheehan v. Army and Air Force Exch. Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982). Jurisdiction under §1331 is also available for judicial review of agency action taken pursuant to agency regulations. *Hondros v. United States Civil Serv. Comm'n*, 720 F.2d 278, 293-5 (3d Cir. 1983); *Local 1219, Amer. Fed. of Gov't Employees v. Donovan*, 683 F.2d 511, 515-516 (D.C. Cir. 1982); *Sheehan, supra*, 619 F.2d at 1139; *Reynolds Metals Co. v. Crowther*, 572 F.Supp. 288, 291 (D.Mass. 1983). Pursuant to 5 U.S.C. §702, judicial review is available; however, that availability is subject to two exceptions: (1) where "statutes preclude judicial review," 5 U.S.C. §701(a)(1), and, (2) where "agency action is committed to agency discretion by law," 5 U.S.C. §701(a)(2); *Chrysler Corp. v. Brown, supra*, 441 U.S. at 317. The second exception applies only "where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). *See also Heckler v. Chaney*, 470 U.S. 821, 830 (1984).

There is a presumption that judicial review will not be withheld without "persuasive reason." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). However, "like all presumptions used in interpreting statutes . . . it may be overcome by . . . specific language or specific legislative history . . . or specific congressional intent to preclude judicial review that is 'fairly discernible' in the . . . legislative scheme." *Block v. Community Nutrition Inst.*, 467 U.S. 349, 351 (1984). *Accord, Brown v. Michigan Academy of Family Physicians*, 106 S.Ct. 2133, 2137 (1986).

Title 5 U.S.C. §301 authorizes the EPA to prescribe regulations to govern itself. That statute provides as follows:

§301. Departmental regulations

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. §301 (1982).

The EPA's regulations governing the extent to which its employees may testify in private lawsuits are set out at 40 C.F.R. §§2.401, *et seq.* Section 2.401(c) provides as follows:

> (c) The purpose of this Subpart is to ensure that employees official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedure for approving testimony or production of documents when clearly in the interests of EPA.

40 C.F.R. §2.401(c).

Section 2.403 is the EPA regulation as to the procedures to be followed when an EPA employee is merely requested to testify as opposed to having been subpoenaed to testify.[2] That section provides as follows:

> §2.403 Procedures when voluntary testimony is requested.
>
> A request for testimony by an EPA employee under §2.403(b) must be in writing and must state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA. Such requests are immediately sent to the General Counsel or his designee (or, in the case of employees in the Office of Inspector

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2. Section 2.404 is the EPA regulation that sets out the procedures to be followed when an EPA employee is subpoenaed to testify. Erdman was never subpoenaed by plaintiffs.

> General, the Inspector General or his designee) with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator, or Staff Office Director (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee), determines whether compliance with the request would clearly be in the interests of EPA and responds as soon as possible.

40 C.F.R. §2.403.

Defendants contend that Section 301, *supra*, provides the court with "no law to apply." Defendants argue that the language of §301 which provides that the agency head "may prescribe" regulations is of "permission and discretion." *Accord, Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 581 (3d Cir. 1979) (*quoting Southern Rwy. Co. v. Seaboard Allied Milling Co.*, 442 U.S. 444, 455 (1979). Defendants maintain §301 is silent on factors which might guide an agency other than the sweeping directive to manage the "government" and "conduct" the affairs of the department, leaving the court with no law to apply. *Id.* The court agrees and, thus, concludes that judicial review is not available pursuant to 5 U.S.C. §701(a)(2).

Even if judicial review were available, the court believes that the EPA's decision not to allow Erdman to testify at a deposition was not arbitrary, capricious or an abuse of discretion and was rationally connected to the facts and in accordance with law. If the decision had a rational basis, *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974), the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, supra*, 401 U.S. at 416. The agency decision is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles, Price Adm'r v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The court must, however, ensure that the decision was based on a consideration of all "relevant factors" and was not a "clear error of judgment." *Citizens to Preserve*

Overton Park, supra, 401 U.S. at 416. *See also, Bowman Transp., Inc., supra,* 419 U.S. at 285.

The language of Section 301 which provides that the agency head "may prescribe regulations for the government of his department" contemplates that the EPA may appraise and decide for itself whether its employees should be permitted to testify in private litigation. Section 2.403 governs the parameters of that appraisal and decision and is necessary to carry out the basic agency management directive of Section 301. It does not broaden or narrow that Section 301 authority. The limited factors that Section 2.403 present for consideration have been followed in this case.

The EPA decision took into account the appropriate considerations of manpower, the press of immediate EPA responsibilities, questions of agency impartiality and the EPA's own interest in a proceeding to which is it not a party. The EPA's decision to deny the plaintiffs' request for Erdman's testimony in private, state court litigation is reasonably related to the purpose of Section 301 and the EPA regulations. Plaintiffs have failed to meet their burden of establishing that the EPA action was lacking in reasonable judgment to the extent that it was an abuse of discretion.

III. CONCLUSION

Accordingly, plaintiffs' motion for summary judgment will be denied and defendants' motion for summary judgment will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVIS ENTERPRISES, SUN PIPE LINE COMPANY, SUN COMPANY, INC., E.A. DESIGN, LTD., JAN GOUZA, and PICKERING, CORTS & SUMMERSON, INC.	:	CIVIL ACTION
V.	:	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and BRUCE DIAMOND	:	NO. 87-5315

ORDER

AND NOW, TO WIT, this 30th day of August, 1988, in accordance with the accompanying Memorandum, after review of the parties' cross-motions for summary judgment and the supporting memoranda as well as plaintiffs' reply brief and plaintiffs' two supplemental reply briefs, IT IS ORDERED as follows:

1. Plaintiffs' motion for summary judgment is hereby *denied*;

2. Defendants' motion for summary judgment is hereby *granted*; and

3. Judgment is hereby *entered* in favor of defendants and against plaintiffs.

LOUIS C. BECHTLE, J.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret consitutional and statutory provisions, and determine the meaning or applicablity of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

32386 Federal Register / Vol. 50, No. 154 / Friday, August 9, 1985 / Rules and Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[FRL-2860-3]

Public Information; Testimony by Employees and Production of Documents in Civil Legal Proceedings

AGENCY: Environmental Protection Agency.
ACTION: Final rule.

SUMMARY: This rule revises 40 CFR Part 2, Public Information, to add a new Subpart C, Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States is not a Party. It generally provides that EPA employees may not officially appear as witnesses or produce documents in Federal, State or local proceedings, either voluntarily or in response to subpoenas, without the consent of the General Counsel or his designee. The intended effect of this regulation is to ensure that EPA employees' time is spent on EPA business and to avoid the appearance that EPA is taking sides in private litigation. Accordingly, employees may not appear as witnesses in their official capacities unless the appearance is approved as being clearly in the interests of EPA. This regulation does not apply to Congressional testimony.

EFFECTIVE DATE: This regulation is effective August 9, 1985.

FOR FURTHER INFORMATION CONTACT: Donnell L. Nantkes, (202) 382-4550.

ADDRESS: Office of General Counsel (LE-132G), Environmental Protection Agency, 401 M Street SW, Washington, D.C. 20460.

SUPPLEMENTARY INFORMATION: EPA employees are frequently requested or subpoenaed to provide testimony or produce documents in litigation to which the United States is not a party. EPA employees are presently required to respond

to valid subpoenas, thereby preventing them from performing their duties and creating the appearance that the Agency is taking sides in private litigation. This regulation is intended to address this problem by prohibiting both voluntary appearances and compliance with subpoenas except where clearly in the interests of the Agency.

Subpoenas to testify concerning information which employees have acquired in the course of performing official duties, or to produce documents, are essentially legal actions against the United States as to which there has been no Congressional waiver of sovereign immunity. The courts have recognized the authority of Federal agencies to limit compliance with such subpoenas. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 482 (1951). Moreover, subpoenas by State courts or legislative committees which attempt to assert jurisdiction over Federal agencies are inconsistent with the supremacy clause of the U.S. Constitution, and a Federal regulation prohibiting compliance with such subpoenas reinforces this principle. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 318 (1819); *U.S.* v. *McLeod*, 385 F.2d 734 (5th Cir. 1987); *Giza* v. *Secretary of HEW*, 628 F.2d 748 (1st Cir., 1980); *Municipal Court* v. *Civiletti*, 172 Cal. Rptr. 83 at 86, 116 Cal. App., 3d 105 (1981).

Accordingly, this regulation prohibits EPA employees from complying with requests for production of documents or subpoenas from Federal and State courts and State or local legislative committees or administrative agencies without the approval of the General Counsel or his designee. (The Inspector General makes the necessary determinations regarding requests and subpoenas involving employees in the Office of Inspector General.)

We recognize that there are situations where EPA should cooperate with Federal, State or local authorities as part of the Agency's joint responsibility for developing and enforcing environmental standards and other policies. This regulation does not preclude such activities, and numerous EPA officials are empowered to authorize such testimony. The regulation also does not apply to Congressional proceedings.

While the regulation applies to information which employees acquire in the course of performing official duties, to production of documents in Agency files and to testimony concerning such document, it is recognized that there are situations where EPA employees may properly serve as expert witnesses on behalf of private parties in matters in which they have general expertise. Such situations are treated as outside employment under 40 CFR Part 3, Subpart E, and employees are required to obtain the written approval of their Deputy Ethics Officials and to perform such activities while in an annual leave status. In such cases, employees are required to state for the record that they are appearing as private individuals and that their testimony does not necessarily represent the official views of EPA.

* * * * *

Dated: August 5, 1985.
Lee M. Thomas,
Administrator.

PART 2—[AMENDED]

For the reasons set out in the preamble, Part 2, Chapter 1 of Title 40, Code of Federal Regulations, is amended as set forth below.

40 CFR Part 2 is amended by adding Subpart C to read as follows:

* * * * *

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States is Not a Party

Sec.

Authority: 5 U.S.C. 301; Reorganization Plan No. 3 of 1970, 5 U.S.C. App.; 33 U.S.C. 361(a); 42 U.S.C. 300j-9; 42 U.S.C. 6911a, 42 U.S.C. 7601(a).

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States Is Not a Party

§2.401 Scope and Purpose.

This subpart sets forth procedures to be followed when an EPA employee is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee's official status. (In such cases, employees must state for the record that their testimony does not necessarily represent the official position of EPA. If they are called to state the official position of EPA, they should ascertain that position before appearing.) These procedures also apply to subpoenas *duces tecum* for any document in the possession of EPA and to requests for certification of copies of documents.

(a) These procedures apply to:

(1) State court proceedings (including grand jury proceedings);

(2) Federal civil proceedings, except where the United States, EPA or another Federal agency is a party; and

(3) State and local legislative and administrative proceedings.

(b) These procedures do not apply:

(1) To matters which are not related to EPA;

(2) To Congressional requests or subpoenas for testimony or documents;

(3) Where employees provide expert witness services as approved outside activities in accordance with 40 CFR Part 3, Subpart E (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA);

(4) Where employees voluntarily testify as private citizens with respect to environmental matters (in such cases employees

must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA).

(c) The purpose of this Subpart is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA.

§2.402 Policy of presentation of testimony and production of documents.

(a) With the approval of the cognizant Assistant Administrator, Office Director, Staff Office Director or Regional Administrator or his designee, EPA employees (as defined in 40 CFR 3.102 (a) and (b)) may testify at the request of another Federal agency, or, where it is in the interests of EPA, at the request of a State or local government or State legislative committee.

(b) Except as permitted by paragraph (a) of this section, no EPA employee may provide testimony or produce documents in any proceeding to which this Subpart applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee under §§2.403 through 2.406.

§2.403 Procedures when voluntary testimony is requested.

A request for testimony by an EPA employee under §2.402(b) must be in writing and must state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA. Such requests are immediately sent to the General Counsel or his designee (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee) with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator, or Staff Office Director (or, in the case

of employees in the Office of Inspector General, the Inspector General or his designee), determines whether compliance with the request would clearly be in the interests of EPA and responds as soon as practicable.

§2.404 Procedures when an employee is subpoenaed.

(a) Copies of subpoenas must immediately be sent to the General Counsel or his designee with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director, determines whether compliance with the subpoena would clearly be in the interests of EPA and responds as soon as praticable.

(b) If the General Counsel or his designee denies approval to comply with the subpoena, or if he has not acted by the return date, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn), produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

(c) Where employees in the Office of Inspector General are subpoenaed, the Inspector General or his designee makes the determination under paragraphs (a) and (b) of this section in consultation with the General Counsel.

(d) The General Counsel will request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Agency and the employee.

§2.405 Subpoena duces tecum.

Subpoenas *duces tecum* for documents or other materials are treated the same as subpoenas for testimony. Unless the General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director (or, as to employees in the Office of Inspector General, the Inspector General) determines that

compliance with the subpoena is clearly in the interests of EPA, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn) and respectfully refuse to produce the subpoenaed materials. However, where a subpoena *duces tecum* is essentially a written request for documents, the requested documents will be provided or denied in accordance with Subparts A and B of this Part where approval to respond to the subpoena has not been granted.

§2.406 Requests for authenticated copies of EPA documents.

Requests for authenticated copies of EPA documents for purposes of admissibility under 28 U.S.C. 1733 and Rule 44 of the Federal Rules of Civil Procedure will be granted for documents which would otherwise be released pursuant to Subpart A. For purposes of Rule 44 the "person having legal custody of the record" is the cognizant Assistant Administrator, Regional Administrator, Staff Office Director or Office Director or his designee. The advice of the Office of General Counsel should be obtained concerning the proper form of authentication.

[FR Doc. 85-18938 Filed 8-8-85; 8:45; am]
BILLING CODE C540-60-M

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
1811 CHESTNUT STREET PHILADELPHIA, PA 19103

June 2, 1987

Joseph Melvin, Esquire
Office of General Counsel
Environmental Protection Agency
841 Chestnut Street
Philadelphia, Pennsylvania

Dear Mr. Melvin:

This law office represents Sun Pipe Line Company in numerous cases pending in the Court of Common Pleas of Bucks County, Pennsylvania, including *Pier Cipriani, et al. (Melso) v. Sun Pipe Line Company, et al.*, No. 83-03557-11-2, and *Joseph Hudachek, et al. v. Sun Company, Inc., et al.*, No. 84-01113-11-2. The *Melso* case is scheduled for trial on September 14, 1987, and the *Hudachek* case is expected to be tried soon thereafter. Both cases involve a pipeline accident which occurred on November 12, 1982, when a cable television company punctured a pipeline operated by Sun in Newtown, Pennsylvania. Approximately 100,000 gallons of unleaded gasoline escaped from the pipeline, and approximately half of it was recovered within 48 hours. The remaining gasoline filtered its way underground and allegedly adversely affected a nearby housing community. The Melso and Hudachek families formerly resided in that community, but they abandoned their homes due to gasoline vapors allegedly entering their residences.

An employee of EPA Region III, Theodore C. Erdman, of the Air Monitoring Section, Environmental Services Division, participated in air monitoring in numerous residences in Newtown on four days in March and April, 1983, including the Melso and Hudachek residences. In particular, Mr. Erdman and other EPA employees collected air samples in Tenax tubes and transmitted them to the City of Philadelphia Health Department for analysis. The results were reported to Mr. Erdman who then reported the results to the Pennsylvania Department

of Health for distribution to interested persons. The Pennsylvania Department of Health had previously requested EPA to conduct air monitoring so that results could be obtained by an objective, disinterested agency. Attached hereto please find copies of letters by Mr. Erdman dated April 19, May 10 and May 23, 1983 setting forth the results of air monitoring in Newtown Crossing residences.

This letter is our request pursuant to 40 C.F.R. §2.401 *et seq.*, for EPA permission to allow Mr. Erdman to testify by videotape deposition for one to two hours concerning his activities in the Newtown Crossing air monitoring project.

During pretrial proceedings, Sun Pipe Line Company submitted Requests for Admissions to the Melsos and Hudacheks requesting that they admit the authenticity and accuracy of the air monitoring results conducted by EPA. Unfortunately, they have refused to do so. (Copies of their responses to the Requests for Admissions are enclosed for your information.) It is for this reason that we find it necessary to depose the EPA employees on these issues. We have spoken with Mr. Erdman on several occasions in the past, and he has been very cooperative regarding our inquiries. We do not anticipate his deposition lasting more than 1 to 2 hours and will be more than happy to travel to his office in an effort to minimize any inconvenience to him and to the EPA.

Of course, we will comply with all reasonable procedures required by the EPA in arranging Mr. Erdman's deposition. Also, we certainly have no objection to having counsel for the EPA present during the deposition.

Let us take pains to point out that the EPA's concerns articulated in the preamble to the regulations governing employee testimony, 50 Fed. Reg. 32386 (Aug. 9, 1985), do not appear to be implicated in this instance. There is very little chance that Mr. Erdman's testimony would give the appearance of favoring one party in the litigation. The EPA was invited to do air monitoring by the Commonwealth of Pennsylvania. At most, Mr. Erdman will be asked about the accuracy of the results obtained and the procedures employed. He will not be asked to render opinion testimony as to whether the levels found were

safe or toxic. That type of evidence will come from expert witnesses such as toxicologists and physicians retained by the parties in the litigation.

Also, Mr. Erdman's testimony will not be a significant drain on EPA employee business. Rather than have Mr. Erdman appear at trial, we are willing to handle it by a videotape deposition to which all parties would have advance notice. This will spare Mr. Erdman the necessity of attending a court hearing and losing time while waiting to testify. At most, it will involve one to two hours of Mr. Erdman's time, which is *de minimus* compared to the time he spent on the project in 1983.

Finally, although the United States is not a party in this litigation, there is nothing in Mr. Erdman's proposed testimony which is in any way inconsistent with EPA interests. EPA was invited to do air monitoring as a neutral, disinterested, trustworthy agency, and therefore its participation was a matter of great public interest in 1983. Now that private litigation is proceeding to trial, there will no doubt be great interest on the part of the jurors in any air monitoring results obtained by governmental agencies. In short, public interest concerns are still at work.

We regret that we have been compelled to request that the EPA furnish testimony in these matters, but we are sure you can appreciate that our request has been made necessary by the refusal of the plaintiffs in the pending lawsuits to admit the truth of the results obtained by EPA.

We are sending this request to you because we have been informed that the EPA Regional Counsel has authority to grant requests for agency testimony. If this has been sent to the wrong person, please forward it to the appropriate person as soon as possible. Thank you.

Very truly yours,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER

Bruce J. Chasan

BJC: vam

bcc: Jon Baughman, Esq.
Edward C. German, Esq.
B. Alan Dash, Esq.
Donald E. Wieand, Jr., Esq.

[attachments and enclosures to letter omitted]

[additional letters by Petitioners' counsel and co-counsel are also omitted, *e.g.* letter by Mr. Chasan, June 8, 1987; letter by Mr. Dash, June 11, 1987; letter by Mr. Wieand, June 15, 1987; and letter by Mr. Gremminger, June 16, 1987]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION III

841 Chestnut Building
Philadelphia, Pennsylvania 19107

July 31, 1987

Bruce Chasan, Esquire
Wilson, Elser, Moskowitz, Edelman & Dicker
1811 Chestnut Street
Philadelphia, PA 19103

Re: Testimony of Theodore Erdman

Dear Mr. Chasan:

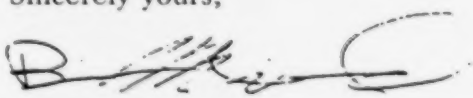
I have reviewed your request for the testimony of Theodore Erdman pursuant to 40 C.F. R. Section 2.401 *et seq.* According to Section 2.403 such testimony must be in the interest of EPA. After consulting with Mr. Erdman's supervisors and the Regional Administrator, I have decided to deny your request.

You argue that denial of your request undermines EPA's ability to "serve as an umpire." EPA's ability to serve the public interest really depends upon the quality of our work in taking samples and doing the analysis which is needed to inform the affected public of hazards. In this case we have done the sampling and analysis which was needed. To have Mr. Erdman testify would add nothing to our public mission and could be seen as taking sides in the litigation. In addition, while the amount of time which this particular exercise might take may be small, the precedent it sets and the future cumulative effect of similar requests could have a significant impact on the Agency's resources. We have had several other requests like this in the past which we have denied.

The regulations were promulgated because of the significant amount of time and resources that requests and subpoenas such as yours were taking. The criteria was meant to make it clear that, if an employee is to testify, the testimony must further EPA's mission. I cannot find that this criterion is met here.

Although you did not request it in your letters, would it be helpful if Mr. Erdman's testimony could be given in the form of an affidavit? If an affidavit would be helpful or you have any questions about this matter, please contact Philip Yeany.

Sincerely yours,



Bruce M. Diamond
Regional Counsel

cc: B. Alan Dash
Donald Wieand, Jr.
Gary Gremminger

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
1811 CHESTNUT STREET PHILADELPHIA, PA 19103

October 21, 1987

Environmental Protection Agency
Region III
841 Chestnut Street
Philadelphia, PA 19107

Attention: Bruce Diamond, Esq.
Regional Counsel

Re: *Requested Videotape Deposition of Theodore Erdman*

Dear Mr. Diamond:

As you know, our client, Sun Pipe Line Company, is presently involved in litigation with the EPA to obtain a videotape deposition of Theodore Erdman, an employee of EPA Region III, for use at one or more trials in which Sun is a defendant in Bucks County, PA. Details concerning our request were previously set forth in our correspondence to the agency dated June 2 and June 8, 1987. On July 31, 1987, you sent us a letter refusing our request. The litigation was filed a few weeks later, on or about August 25, 1987.

Because this matter appears to be headed for a decision by the U.S. District Court, we thought it would be worthwhile to attempt to persuade you that the agency should change its position. Though we do not expect you to reverse your position easily, we desire to present some additional arguments for your consideration. (The Assistant U.S. Attorney, Virginia Gibson-Mason, does not object to our writing directly to you on this matter.)

(1) *Taking sides.* In your letter of July 31, 1987, you stated that permitting Mr. Erdman to testify could be seen as taking sides in the Bucks County litigation. While we agree that one leading purpose of the EPA regulations is to avoid EPA

becoming an advocate for one party or another in a private lawsuit, we strongly disagree with your conclusion on this criterion.

We have been in touch with the City of Philadelphia Health Department employees who did the laboratory work in analyzing the samples collected by EPA in various homes in Newtown Crossing. The Health Department employees are willing and able to testify if needed. The City Solicitor's office has not objected. Unfortunately, the samples furnished by Mr. Erdman to the Health Department employees were coded, and Mr. Erdman's testimony is therefore needed to prove the results obtained at each house. Also, the sampling procedures employed by Mr. Erdman and EPA co-workers need to be proved.

It would appear that the major items of proof pertain to Mr. Erdman's ability to competently conduct and assist in conducting the air sampling, and his ability to accurately report the results, etc. Mr. Erdman is but one link in a chain of evidence we are attempting to adduce. It bears reiteration that Sun does not wish to call Mr. Erdman in a typical expert witness situation. He will not be asked to render any opinion testimony as to whether the levels found were toxic or caused particular symptoms or increased the risk of a chronic disease. Those matters will be handled by experts specially retained by the defendants.

In light of the above, EPA would not be taking sides in making Mr. Erdman available for a videotape deposition. The agency would merely be facilitating the production of relevant evidence.

By definition, relevant evidence tends to make a fact in issue either more or less probable. See F.R.E. 401. All relevant evidence aids the proponent, otherwise the proponent would not bother with it. But it does not follow in logic or law that a witness with relevant evidence is siding with the party who summons him to court. On the contrary, neutral, indifferent and even hostile witnesses are subpoenaed every day by litigants to testify or produce relevant evidence. Jurors are quite capable of discerning that such witnesses do not favor the party who puts them on the witness stand.

We think that the agency's position in refusing permission for Mr. Erdman's testimony is, in effect, taking sides on behalf the Bucks County litigants who oppose the introduction of the EPA and City of Philadelphia air monitoring results. We are sure the agency does not specifically intend this, but we think that that is the effect. The purpose of the EPA regulations, *i.e.* not taking sides, would be better served by allowing Mr. Erdman's videotape deposition. In that fashion, relevant evidence would be available to all litigants and to the jury, and no litigant would be prejudiced by an inability to adduce relevant proof.

(2) *Agency Interest.* Your letter of July 31st indicated your belief that we had not made a sufficient showing that our request for Mr. Erdman's testimony was clearly in the agency's interest. We do not intend to reiterate or expand upon our previous arguments on this because it is usually a very subjective judgment as to whether and when the agency's interest is being furthered or otherwise served.

We do wish to call your attention to certain materials which were not available to us when we last wrote on June 8, 1987. We have since obtained materials from Donnell Nantkes, Esq., of the EPA Office of General Counsel, under the Freedom of Information Act, as to numerous requests granted by EPA for testimony by agency employees in various private lawsuits. In particular, we are enclosing the requests for testimony and the agency approvals in the following cases: (1) *Crocker and Bobb v. Florida Power & Light Company;* (2) *The Collins Company v. City of Decatur*; (3) *Ocean View Farms, Inc. v. Chevron Chemical Company*; (4) *T. O. Bell v. Dow Chemical Company*; (5) *Griffin Corp. v. Wesley Industries, Inc.*; (6) *Shargel v. Terminex International, Inc.*; (7) *Schroeder v. Northrop Services., Inc.*; (8) *ETSI Pipeline Project v. Burlington Northern, Inc.*, and *Janklow v. Kansas City Southern Industries, Inc.* (In some of the foregoing examples, the agency approvals are available, but not the requests.)

These cases indicate that your counterparts in the EPA have often applied the criteria in the agency regulations, 40 C.F. R. Sec. 2.401 *et seq.*, quite differently from the manner in which

you have applied them. The agency has often given controlling weight to arguments that denying requests for agency employee testimony on relevant factual matters would unfairly prejudice the party seeking to adduce the evidence. In particular, see the materials pertaining to *Crocker and Bobb v. Florida Power and Light Company, Ocean View Farms v. Chevron Chemical Company*, and *ETSI Pipeline Project v. Burlington Northern, Inc.* In these cases we think it is very difficult to discern how the agency concluded that it was clearly in EPA's interest to allow the testimony of agency employees. Attempts to distinguish these cases only serve to emphasize the basic similarity of Sun's request.

All we are asking is that the same flexibility be applied to our request as has been applied by the agency in the above-referenced cases. The agency bears a risk of appearing arbitrary if the criteria are weighed differently when similar requests are made. We believe the showing that we have made is equivalent to or better than what the requestors have shown in the above-referenced cases.

(3) *Time.* You have acknowledged that the time required for Mr. Erdman's testimony would not be significant. We appreciate that acknowledgement, and we note that the EPA has been very generous with its employees' time in the above-referenced cases furnished to us by Mr. Nantkes. The one to two hours required for Mr. Erdman's deposition certainly should not cause a serious disruption in any agency program. Nor would it be unprecedented.

(4) *Affidavit.* We appreciate your offer to grant Mr. Erdman the time to prepare an affidavit. However, it appears that the homeowner plaintiffs in the Bucks County litigation want the opportunity to cross-examine the witness. Obviously an affidavit does not afford that possibility. His deposition, including cross-examination, can probably be accomplished in the same time that it would take to prepare the affidavit.

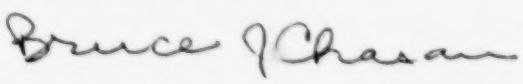
(5) *Private time.* Your letter did not discuss it, but if the agency would allow Mr. Erdman to testify as a privately-retained consultant, on his own time, see 40 C.F.R.

§§2.401(b)(3), (c), then we would not have any further need to pursue the litigation.

In light of all of the above, we request you to reconsider your decision of July 31, 1987. Thank you.

Very truly yours,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER



Bruce J. Chasan

BJC:vam

cc: Virginia Gibson-Mason, Esq. (w/o Encls.)
Philip Yeany (w/o Encls.)
Donald E. Wieand, Jr., Esq. (w/o Encls.)
Edward C. German, Esq. (w/o Encls.)
B. Alan Dash, Esq. (w/o Encls.)
Jon A. Baughman, Esq. (w/o Encls.)

[enclosures omitted]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION III

841 Chestnut Building
Philadelphia, Pennsylvania 19107

December 18, 1987

Bruce Chasen, Esq.
c/o Wilson, Elser, Moskowitz, Edelman & Dicker
1811 Chestnut Street
Philadelphia, PA 19103

Re: Deposition Of Theodore Erdman

Dear Mr. Chasen:

I am responding to your October 21, 1987 letter to me asking that I reconsider the Agency's original decision to deny your request for the videotaped deposition of Theodore Erdman. First let me say that I was disappointed to hear through Virginia Gibson-Mason that the Agency's offer to have Mr. Erdman authenticate his letters in person would not satisfy your needs. I hope that you recognize that the Agency was attempting to meet your requirements without unnecessarily sacrificing its resources.

After reconsideration of your request I still do not think that it would clearly be in the interest of EPA to have Mr. Erdman testify and must again deny your request. None of the arguments in your October 21 letter persuade me that the Agency's original decision was incorrect. I have set forth below my reasons for rejecting the arguments in your letter.

(1) *Taking sides.* I think that it is obvious that the purpose of any witness is to help the trier of fact reach a decision as to the probability of a fact in issue. Also, obviously, no side in any litigation calls a witness unless it thinks that the witness will aid in presenting that side's view of the facts. Your request for Mr. Erdman's testimony, I think you would concede, is made in the expectation that his testimony will favor your view of the facts in the Bucks County litigation.

Whether or not the Agency decides to allow an employee to testify will tend to favor one side in a suit over another. One of the purposes of EPA's promulgation of its testimony regulations was to avoid the appearance of favoring one side or another. This is one of the reasons why, I believe, that the standard for deciding whether to allow an EPA employee to testify is set in terms of only considering EPA's interests and not the interests of the parties in the third party litigation. In order to preserve its impartiality, the Agency did not take into account the effect that Mr. Erdman's testimony would have in the Bucks County litigation when it denied your request.

(2) *Agency Interest.* Except to note that EPA has permitted other employees to testify in certain situations, your letter does not present any new reasons why allowing Mr. Erdman to testify would be in the Agency's interest. Because the decision about permitting employee testimony is one which is committed to Agency discretion, I do not concede that the instances cited by you constitute a "common law" on allowing employee testimony. Having stated this, none of the instances cited by you persuade me that there is clearly benefit for the Agency in this case in having Mr. Erdman testify.

With the exception of the *Crocker and Bobb v. Florida Power and Light Company, Ocean View Farms v. Chevron Chemical Company,* and *ETSI Pipeline Project v. Burlington Northern, Inc.* cases, the case materials you supplied did not provide enough information to identify the Agency's interests in the other cases. (I should note that in the case materials you supplied, none of the requests were made to Region III. In fact, for one of the cases, *Shargel v. Terminix International, Inc.*, Region III denied a companion request for testimony.)

In the *Crocker and Bobb* case the Agency had a continuing interest in the situation because the PCB transformer fire which was involved in the suit had been one of several major contamination incidents which caused EPA to reassess its regulations covering PCB containing transformers in buildings. The Agency was interested in preventing such incidents. In addition, the suit raised questions about representations made to EPA about the

cause of the fire. The *Ocean View Farms* case also appears to be a case where EPA, although not a party to the litigation, had a continuing interest in the litigation and the incident which precipitated the suit. Allowing the employees to testify was permitted because this supported the actions and policies of the Office of Pesticide Programs on the misuse of pesticides and would be consistent with EPA's prior actions in the situation. Finally in the *ETSI Pipeline Project* case EPA clearly had an interest in having the employees testify in order to protect the Agency's reputation for fairness in dealing with controversial subjects. Allegations had been made by one side in the suit that EPA had unnecessarily and unreasonably delayed its consideration of environmental permits as well as taken actions that were beyond the scope of the Agency's authority.

In reviewing the materials you submitted on the actions of other EPA Regions and Headquarters, I noted you did not provide the denial by Region I of your request to have Dr. Thomas Spittler testify in the Bucks County litigation by videotape deposition. In your letter to me you did not provide a rationale why Region III should treat this matter in a different fashion than Region I.

(3) *Time.* I reiterate the point I made to you in my July 31 letter that the precedent set by having Mr. Erdman testify and the future cumulative effect of similar requests could have a significant impact on the Agency's resources.

(4) *Affidavit.* Given the response of the homeowner plaintiffs in the Bucks County litigation, this appears to be a moot issue. I would only be speculating as to the time it would take to prepare the affidavit.

(5) *Private time.* Mr. Erdman has stated that he is not interested in testifying during his private time.

For the reasons stated above, the Agency stands by its original decision not to allow Mr. Erdman to testify.

Very truly yours,

Bruce M. Diamond
Regional Counsel

No. 89-739 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVIS ENTERPRISES, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
RICHARD B. STEWART
Assistant Attorney General
ANNE S. ALMY
MARTIN W. MATZEN
Attorneys

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Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below correctly held that the decision by the Environmental Protection Agency (EPA) to deny petitioners' request to take an Agency employee's deposition in connection with private tort litigation in state court reasonably applied the criteria set forth in EPA's governing regulations and therefore was not arbitrary, capricious, or an abuse of discretion.

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No. 89-739

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 877 F.2d 1181. The opinion of the district court (Pet. App. A25-A34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1989, and the petition for rehearing was denied on August 8, 1989 (Pet. App. A24). The petition for a writ of certiorari was filed on November 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises from petitioners' efforts to compel the testimony of employees of the Environmental Pro-

tection Agency (EPA) in private tort litigation in state court to which the federal government is not party. In the state-court litigation, petitioners have been held liable for damages resulting from an accidental gasoline leak that caused gasoline vapors to enter the homes of the plaintiffs; the amount of the damages remains to be tried.

Following the accident, certain EPA employees had performed air-quality monitoring tests in some of the affected homes at the request of state health authorities. The documented results of this testing were made available to all concerned. Petitioners, who allege that the test results are favorable to their position that the plaintiffs suffered little or no injury, wish to use those results in the damages phase of the state-court litigation.[1] In pre-trial discovery during the damages phase of the litigation, petitioners served requests for admissions on the plaintiffs, which include proposed admissions of the authenticity and truth of the results of the tests conducted by EPA. The plaintiffs have refused to admit the truth of the test results without an opportunity to cross-examine the EPA employees who did the work. Petitioners also assert that the test results might not be admissible in evidence under Pennsylvania law in light of the objections of the homeowner-plaintiffs. Pet. App. A3-A4; Pet. 3-5.[2]

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[1] The state-court litigation consists of a class action and several other suits brought by plaintiffs who opted out of the class action. The state trial court permitted the class action to proceed on the question of liability, but held that each class member must prove damages on an individualized basis. After the liability verdict in the class action, the state trial court designated the claims of two individual homeowners (one a class member and one not) to be tried first. See Pet. 4.

[2] Petitioners represented during the oral argument in the court of appeals that they had requested an *in limine* ruling from the state trial court concerning the admissibility of the EPA test results in the absence of an opportunity to cross-examine the EPA employees, but the state court declined to make such a ruling. Pet. App. A4-A5.

2. This is the second case in which petitioners have sought to bring before this Court their unsuccessful efforts in the lower courts to compel the testimony of EPA employees. The first case was *Appeal of Sun Pipe Line Co.*, 831 F.2d 22 (1st Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988), in which petitioner Sun Pipe Line applied for an order from a federal district court to compel testimony in the state-court litigation of one of the EPA employees who had performed the same air-quality tests and was then working in EPA's Region I. Pet. App. A5-A6 & n.1, A28 n.1. EPA, acting through the Regional Counsel for Region I, denied that request for the employee's testimony on the basis of EPA regulations governing requests or subpoenas for EPA employees to provide testimony concerning information acquired in the course of their official duties. 40 C.F.R. Pt. 2, Subpt. C (*reproduced at* Pet. App. A36-A42). Compare *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). The purpose of the EPA regulations is "to ensure that [EPA] employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA." 40 C.F.R. 2.401(c). Any such request for an employee's testimony must be approved by the General Counsel (or his designee), and approval will be granted only when allowing the testimony would "clearly be in the interests" of EPA. 40 C.F.R. 2.403.

In the prior case, the First Circuit affirmed the district court's refusal to compel the employee's testimony, rejecting on essentially procedural grounds petitioner Sun Pipe Line's attempt to convert its action seeking "relief in the nature of mandamus" (831 F.2d at 24) into one for review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, of EPA's decision declining to permit the employee

to testify. The First Circuit did not decide whether such agency decisions are subject to judicial review, 831 F.2d at 24-25, but it did conclude, *id.* at 23 n.3, that its own decision in *Giza* v. *Secretary of HEW*, 628 F.2d 748 (1980), "was clearly controlling" on the issue of the district court's lack of authority to compel a federal employee to respond to a state-court subpoena in his official capacity where his federal employer had given him a contrary instruction.[3] For this proposition, the court of appeals cited (831 F.2d at 23 n.3) this Court's decision in *Touhy*, 340 U.S. at 467-470, which held that a subordinate federal official could not be held in contempt for his refusal to comply with a subpoena *duces tecum* where his superior had precluded compliance under valid federal regulations controlling the release of official documents.

3. a. In this case, petitioners submitted a request to EPA under governing regulations for EPA to authorize a second employee to sit for a videotaped deposition concerning his involvement in the air-quality testing done after the gasoline leak at issue in the state-court tort litigation. Pet. App. A43-A46. Acting pursuant to 40 C.F.R. 2.403, EPA's Regional Counsel denied petitioners' request (Pet. App. A47-A48, A54-A56), based on his determination that the giving of such testimony "would add nothing to our public mission and could be seen as taking sides in the litigation," and that while the time consumed by this particular deposition "may be small, the precedent it sets and the future cumulative effect of similar requests could have a significant impact on the Agency's resources." *Id.* at A47.[4]

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[3] In neither the prior *Sun Pipe Line* case (831 F.2d at 23) nor the instant case (Pet. App. A31 n.2) did the state court actually issue a subpoena for the testimony petitioners sought.

[4] EPA did, however, offer to provide the employee's testimony by affidavit. Pet. App. A48.

b. Petitioners then filed this action in the United States District Court for the Eastern District of Pennsylvania seeking judicial review of EPA's denial of their request for the employee's testimony. The district court granted summary judgment in favor of EPA. Pet. App. A25-A33. It first held that EPA's decision was not subject to judicial review because the "housekeeping" statute under which EPA's regulations were promulgated, 5 U.S.C. 301, provided the court with "no law to apply." Pet. App. A32. In the alternative, the district court held that if review was available, EPA's decision must be sustained because it was based upon a reasonable appraisal of the "parameters" its regulation required to be considered. *Id.* at A33.

c. The court of appeals affirmed. Pet. App. A1-A23. It disagreed with the district court's holding that EPA's decision is unreviewable, finding instead that the "factors enumerated" in EPA's regulations supply the courts with "sufficient law to apply" in reviewing the decision. *Id.* at A6-A11, A17. However, the court of appeals agreed with the district court that EPA's decision should be sustained on the merits. *Id.* at A11-A16. It noted that EPA had not "withheld relevant information as to the test results" from the parties to the state-court litigation, *id.* at A13, and that petitioners did not challenge the EPA regulations under which petitioners' request for the employee's testimony was denied. *Id.* at A17. With the issues thus confined, the court held that EPA had reasonably applied the criteria set forth in its regulations, *id.* at A12-A16, and that EPA had therefore not abused its discretion or otherwise erred, but had instead acted "within the parameters of [its] discretion" as set forth in the regulations. *Id.* at A17.

Judge Weis dissented. Pet. App. A17-A23. He agreed with the majority that EPA's decision was subject to judicial review, *id.* at A17, but believed that the decision should be

set aside as arbitrary and capricious. *Id.* at A22-A23. Judge Weis acknowledged that the regulations under which EPA made its decision must be deemed valid for purposes of this case. *Id.* at A19. But he nonetheless was of the view that EPA should have assessed the "interests of justice" as a "critical factor" in deciding whether to permit the deposition, *id.* at A21, even though EPA's regulations do not identify that as a relevant factor.

ARGUMENT

The court of appeals correctly held that EPA's decision denying petitioners' request for the EPA employee's testimony in private litigation in state court was consistent with governing regulations and was not arbitrary or capricious. That decision does not conflict with any decision of this Court or of another court of appeals, and it presents no issue warranting review by this Court.

1. Petitioners first suggest in passing (Pet. i, 8) that this case presents the threshold issue of whether EPA's decision is subject to judicial review. The court of appeals, however, unanimously ruled in favor of petitioners on that issue, accepting their argument that EPA's own regulations supply sufficient "law to apply" in conducting such review. Pet. App. A6-A11. Regardless of whether the court below correctly decided this issue of first impression against the government, it is not properly presented on *petitioners'* request for review.[5]

2. The issue upon which petitioners actually lost below—whether EPA's decision denying petitioners' request under EPA regulations governing the furnishing of employees' testimony was arbitrary and capricious (Pet. i)—

[5] The reviewability issue would, of course, remain available to respondents as an alternative ground for affirmance of the judgment below if the Court granted the petition.

does not warrant review. As both the majority and dissenting opinions in the court of appeals pointed out (Pet. App. A6, A17, A19), petitioners did not argue in either court below that the governing EPA regulations are invalid. Accordingly, both courts below scrutinized EPA's decision against the backdrop of the discretionary standards set forth in the regulations themselves—regulations that petitioners themselves had urged as the "law to apply" (*id.* at A9, A11). And both courts below found that EPA had considered the factors made relevant by its regulations and reached a reasonable conclusion (*id.* at A12-A16, A33). This conclusion was correct.

The pertinent regulations provide that the Agency will grant a request for an employee's testimony only where it would be "clearly in the interests of EPA" (40 C.F.R. 2.401(c), 2.403), and the regulations list certain purposes that are served by that standard: "to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, [and] to ensure that public funds are not used for private purposes" (40 C.F.R. 2.401(c)). The EPA Regional Counsel relied on these factors in denying petitioners' request, noting that although EPA had done the sampling and analysis that was requested of it by state health officials, permitting the EPA employee to testify in the private tort suits "would add nothing to [EPA's] public mission and could be seen as taking sides in the litigation," and "the future cumulative effect of similar requests could have a significant impact on the Agency's resources." For these reasons, the Regional Counsel concluded that it would not be in the interests of EPA to furnish the employee as a witness. Pet. App. A47. Thus, EPA's decision "was based on a consideration of the relevant factors," and petitioners have not shown that "there has been a clear error of judgment" in applying those factors. See *Motor Vehicle Mfrs. Ass'n of the United States,*

Inc. v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)).[6]

The decision of the court of appeals sustaining EPA's refusal under applicable regulations to make its employee available in the circumstances of this case does not conflict with any ruling by another court of appeals. Nor is the fact-specific ruling below one of general importance that warrants review by this Court in the absence of a circuit conflict. Indeed, it is not even clear that the decision below will prove to be of practical importance to petitioners,

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[6] Judge Weis's view in his dissent that EPA's decision was not valid under applicable regulations would effectively revise the criteria set forth in those regulations and give primary weight to the "interests of justice" (Pet. App. A21), rather than the "interests of EPA" (40 C.F.R. 2.401(c), 2.403). It apparently is Judge Weis's view that EPA must furnish its employees as witnesses for private parties who show a need for their testimony, even in state court, unless there are "unassailable grounds" for declining to do so. Pet. App. A21. We may assume for present purposes that EPA might have adopted such a policy, and treated the satisfaction of private parties' need for witnesses from EPA as a principal or presumptively dispositive factor. But EPA chose instead to give priority to the statutory missions assigned to it by Congress, and to permit the use of its resources to provide witnesses in private litigation only when that course would also "clearly be in the interests" of the EPA's assigned functions. 40 C.F.R. 2.403. That policy for the allocation of scarce agency resources plainly is not arbitrary or capricious.

In this case, for example, it could not seriously be contended that EPA would have been required to conduct the air-quality testing over its own objection if petitioners asserted a "need" for the expert opinion of EPA's employees in their private litigation regarding the injuries sustained by homeowners. On that theory, EPA would become like a private firm of technical experts. The result is no different here simply because EPA acceded to the request by state health officials to conduct the tests. EPA might be deterred from offering voluntary assistance in the first place if the courts were to hold that EPA would thereby be bound to make its employees available in private litigation to elaborate upon the agency's work product.

because the state trial court has not yet ruled on whether the test results will be admitted into evidence in the state-court litigation despite the unavailability of the EPA employee's testimony.[7]

3. The third and last of the issues raised by petitioners (Pet. i, 10-13)—whether EPA was obliged to consider and give presumptively controlling weight to petitioners' asserted need for the employee's testimony, rather than to the factors set forth in its regulations—is not properly presented for review. Petitioners' current argument, drawn for the most part from Judge Weis's dissenting opinion below, is

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[7] The court of appeals acknowledged (Pet. App. A4-A5) petitioners' claim that the results of EPA's air-quality monitoring might be inadmissible in state court without the supporting testimony of the EPA employee, and that this might hamper petitioners' defense. However, the court also noted that the test results "may in fact be admissible" (*id.* at A15 n.4).

Petitioners do not argue in this Court that the test results are inadmissible as a matter of law in state court by virtue of the judgment below, and they do not foreclose themselves from urging the state court to admit the results into evidence. See Pet. 5 n.2. Moreover, the case upon which petitioners rely for the proposition that Pennsylvania courts do not follow the Federal Rules of Evidence "on expert testimony" (*ibid.*) states only that Pennsylvania does not follow the approach of Fed. R. Evid. 705 by "allowing an expert to testify to his opinion without elucidating underlying factual assumptions." *Kozak* v. *Struth*, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987). Other state cases show that Pennsylvania courts do tend to follow Fed. R. Evid. 703, by permitting expert testimony based upon facts not in evidence when the facts are derived from a source reasonably relied upon by experts in his field. See, *e.g.*, *In re Glosser Brothers, Inc.*, 382 Pa. Super. 177, 198-199, 555 A.2d 129, 139-140 (1989). In light of this and other arguments that petitioners might present to the state court, we doubt that petitioners would concede the correctness of Judge Weis's view that the test results "cannot be submitted to the jury in the state court" without EPA's cooperation (Pet. App. A21). Moreover, as we have noted (see note 4, *supra*), EPA did offer to provide an affidavit by the employee whose testimony was sought.

nothing less than a direct attack upon the very regulations that petitioners not only declined to challenge below, but affirmatively conceded were valid. See Pet. App. A6, A17, A19.[8] Thus, although petitioners argued below that "EPA did not follow its own regulatory criteria" (*id.* at A12), they now argue that EPA's decision must be set aside because "the interests of justice were not taken into account" (Pet. 11)—*i.e.*, because EPA's Regional Counsel did not consider a factor that is not mentioned in EPA's regulations and is quite distinct from the standard upon which those regulations required him to base his decision: whether the testimony would be "clearly in the interests of EPA." 40 C.F.R. 2.401(c), 2.403. Accordingly, the issue to which petitioners now ascribe such importance necessarily entails a challenge to the legal validity of EPA's regulations. Because petitioners did not challenge the regulations below, and because the court of appeals therefore did not decide that question (Pet. App. A17), there is no occasion for this Court to consider it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[9]

Nor is there any conflict among the circuits concerning the validity of EPA's regulations that would warrant review

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[8] See Pet. C.A. Reply Br. 13 ("[I]t is Appellants' contention that Regulation 2.403 is valid, but that EPA failed to consider the relevant factors contained in said Regulation and abused its discretion in reaching its decision.").

[9] Petitioners' assertion (Pet. 8) that this case "squarely presents those vexing and very important questions" left open by this Court's decision in *Touhy* is extravagant. EPA has not withheld the test results, under claim of privilege or otherwise. Pet. App. A13. EPA has simply denied petitioners' request to take its employee's deposition. Nor has EPA "shut off an appropriate judicial demand" for information or testimony. *Touhy*, 340 U.S. at 472 (Frankfurter, J., concurring). Unlike in *Touhy*, no subpoena or other "judicial demand" was issued in this case. Pet. App. A31.

by this Court even if that question were properly presented. In fact, the ruling below appears to be the first appellate decision in a case brought under the APA seeking judicial review of an EPA decision denying a request for an employee's testimony for use in state-court proceedings.[10] However, in the related context of a state-court subpoena directed to an EPA employee, the Fourth Circuit recently followed *Touhy* in reversing a district court order enforcing such a subpoena. *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 69-70 (1989). Significantly, the court in *Downie* found that EPA has "a valid and compelling interest" in keeping its employees "free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest." *Id.* at 71. Noting the "current explosion in environmental litigation," the Fourth Circuit echoed the concerns expressed by EPA's

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[10] As petitioners note (Pet. 9 & n.4), other federal agencies also have regulations governing the manner and extent to which their employees and documents may be made available in private litigation. However, as petitioners also note (Pet. 10 n.6), those regulations differ depending upon the agency, its underlying statutory authority, and its particular missions and needs. There likewise is little case law involving APA review of agency decisions under those regulations.

The federal courts have uniformly followed this Court's holding in *Touhy* when confronted with cases involving subpoenas directed to subordinate federal employees who have been directed not to testify pursuant to their employing agency's regulations. See, *e.g.*, *Nationwide Investors* v. *Miller*, 793 F.2d 1044, 1048 (9th Cir. 1986); *Swett* v. *Schenk*, 792 F.2d 1447, 1451-1452 (9th Cir. 1986); *United States Steel Corp.* v. *Mattingly*, 663 F.2d 68 (10th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *Giza* v. *Secretary of HEW*, 628 F.2d at 751; *Cates* v. *LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973); *Saunders* v. *Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968); *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967); *Smith* v. *C.R.C. Builders Co.*, 626 F. Supp 12, 14-15 (D. Colo. 1983); *Reynolds Metals Co.* v. *Crowther*, 572 F. Supp. 288, 290-291 (D. Mass. 1982); *Hotel Employees-Hotel Ass'n Pension Fund* v. *Timperio*, 622 F. Supp. 606, 607 (S.D. Fla. 1985).

Regional Counsel in this case (see Pet. App. A47), stating that "a strict adherence to [EPA's] internal regulations is essential if it is to be successful in preventing its expert employees from being targeted as potential witnesses in private actions." 873 F.2d at 72.[11]

In short, the EPA regulations that petitioners now seek to have this Court review (and effectively revise) are of substantial importance to EPA's performance of its statutorily assigned public missions. If the Court were ever to conclude that the validity of those regulations warrants review, that task should be undertaken only in a case in which the issue has actually been litigated and decided below. This is not such a case.

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[11] The Fourth Circuit further recognized EPA's special need for these regulations (873 F.2d at 70):

> Because of the nature of the duties it exercises and programs it administers, the EPA is particularly vulnerable to the demands of private parties seeking information acquired as a result of official investigations * * *. If EPA's On-Scene Coordinators were routinely permitted or compelled to testify in private civil actions, significant loss of manpower hours would predictably result and agency employees would be drawn from other important agency assignments.

Accord, *Environmental Enterprises, Inc.* v. *United States EPA*, 664 F. Supp. 585, 586 (D.D.C. 1987) (if the state courts could "so easily subpoena federal officials" in cases to which the government is not a party, "the officials might find themselves spending all of their time doing nothing but complying * * * and thus they would have little opportunity to pursue their important governmental responsibilities").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 89-739 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DAVIS ENTERPRISES, SUN PIPE LINE COMPANY, SUN COMPANY, INC., AND E.A. DESIGN, LTD.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND BRUCE DIAMOND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the court of appeals, Judge Weis in dissent stated categorically that "the issue of whether the EPA properly refused to permit its employee to testify is squarely before us." Pet. App. A-18. He expressly noted there is no issue of either sovereign immunity or of "*Touhy* immunity for a subordinate" (Pet. App. A-18 & n.2), which had frustrated many prior challenges to an agency's refusal to allow an employee to testify. *See* the cases cited by the court of appeals at A-11 to A-12 (majority) and A-18 (Weis, J., dissenting), and by Respondents at Resp. Mem. Opp. 11 n.10. Correlatively, the majority in the court of appeals addressed frontally the three issues in the case, albeit reaching a result favoring EPA. Pet. App. A-11 to A-17. Thus, the questions reserved by this Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 469 (text accompanying n.9),

470-73 (Frankfurter, J., concurring) (1951), are fully and fairly posed by the petition. Respondents' veiled suggestion to the contrary, *i.e.*, that it is "extravagant" to deem each of those questions to be presented (Resp. Mem. Opp. 10 n.9), reflects a sudden, unwarranted shift by them in premises. Surprisingly, the agency has changed position regarding the effect of its regulation respecting testimony by its employees in private actions, 40 C.F.R. Part 2, Subpart C. Moreover, as discussed below, the agency's shift in position in this Court from that taken in the district court and the court of appeals provides an added impetus for this Court to grant the writ.

1.

In the court of appeals, as in the district court, the parties' arguments proceeded from the jurisdictional question respecting the reviewability of EPA's action, stated as the first question in the petition.[1] Petitioners contended that EPA's action in foreclosing factual testimony by its employee was reviewable agency action under the Administrative Procedure Act. Among other things, petitioners argued that EPA's regulations concerning such testimony provided at least some law for the court to apply. Pet. App. A-6 to A-11. EPA's contrary position was that there were no legal standards applicable to its action:

> The EPA on the other hand contends that 5 U.S.C. § 301 provides unfettered discretion on matters pertaining to control of its employees, that *the regulations do no more than provide a non-exclusive set of factors to be considered*

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1. Where a threshold jurisdictional issue is plainly and unavoidably extant in a case, as here, it surely is proper for petitioners at least to note that fact in the questions presented. Because of its jurisdictional nature, the reviewability question inheres in this case, and is within the power of this Court to consider, whether or not respondents would choose to raise it as an alternative ground for affirmance of the judgment below, *See, e.g., Harrison v. PPG Industries*, 446 U.S. 578, 586 (opinion of the Court by Stewart, J.), 595 (Blackmun, J., concurring in the result), and 602, 603 (Stevens, J., dissenting) (1980). Respondents' suggestion to the contrary (Resp. Mem. Opp. 6 & n.5) is erroneous.

> in making decisions as to whether to permit employee testimony in a given case, and that a reviewing court has no legal standard to apply. Thus, argues the EPA, the exception in 5 U.S.C. § 701(a)(2) is met.

Pet. App. A-9 (emphasis added).

Indeed, in the court of appeals, as in the district court, all involved, petitioners, respondents, the majority of the court of appeals, and the dissenter, agreed that EPA's regulations "did not state a legal standard" but rather merely "specif[ied] a number of relevant factors." Pet. App. A-10. Both the jurisdictional dispute and the merits turned on the legal consequences of this circumstance.

Now, however, in this Court respondents have abjured the posture that EPA's regulations provide "a non-exclusive set of factors to be considered." Pet. App. A-9, quoted *supra*. Instead, the regulations are said to provide an exclusive listing of factors constituting the "standard" upon which EPA's Regional Counsel was "required . . . to base his decision." Resp. Mem. Opp. 10.

This shift in position has no justification either in the prior proceedings in this case or in the regulations at issue. The shift seems designed to shut out from consideration the first principle applicable to this case, *i.e.*, the duty and obligation of any citizen, including an agency employee, to produce evidence in court. The principle is not stated in EPA's regulations. It is, however, fundamental to our jurisprudence, and it cannot be shunted aside by an interpretative maneuver.

In the court of appeals, the majority and the dissenter had common ground with the parties that the regulations established a non-exclusive list of factors. The disagreement arose over the weight to be accorded the chief factor not stated — the generally applicable duty of all persons to provide relevant testimony. In that regard, petitioners did not challenge the validity of EPA's regulations; it was not necessary to challenge a non-exclusive regulatory list of factors because any other pertinent factor could be and was raised.[2] However, petitioners challenge as contrary

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2. Perhaps it is not too surprising in the circumstances that EPA itself relies heavily (and mistakenly) on a factor not expressly stated in the

to law any newly proffered interpretation that deems the listing of factors in EPA's regulations to be exclusive and limiting.

2.

This Court's prior decisions touching on the duty of persons to testify in private civil litigation strongly support granting the writ in this case. In addition to the venerable line of cases cited by Judge Weis in dissent, Pet. App. A-18, less than a month ago this Court in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 58 U.S.L.W. 4093, 4095 (January 9, 1990), rejected a claim of privilege premised upon the functioning of colleges and universities. This claim had many features salient to EPA's reliance in this case on the housekeeping statute and the agency's functioning. In *University of Pennsylvania*, this Court observed:

> We do not create and apply an evidentiary privilege unless "it promotes sufficiently important interests to outweigh the need for probative evidence. . . ." *Trammel v. United States*, 445 U.S. 40, 51 (1980). Inasmuch as "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence,' " *id.*, at 50, quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950), any such privilege must "be strictly construed." 445 U.S. at 50.

3.

A judicial decision properly considering the duty of agency employees to provide testimony in private civil litigation is *Southeastern Pennsylvania Transportation Authority v. General Motors Corporation*, 103 F.R.D. 12 (E.D. Pa. 1984) (Van Artsdalen, J.) ("*SEPTA*"). This federal district court action concerned alleged breach of contract and breach of express and implied warranties by defendant (GM) in the sale of certain

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NOTES *(Continued)*

regulations, *i.e.*, a concern "future cumulative effect of similar requests could have a significant impact on the Agency's resources." Resp. Mem. Opp. 7.

buses to a municipal transit authority (SEPTA). SEPTA served a subpoena to take the deposition of a non-party federal government employee, David Perez, of the United States Department of Transportation (DOT), who had undertaken a study of the design aspect alleged to be defective. The government objected and moved to quash, citing DOT regulations (49 C.F.R. § 9.7 (1983)) which are very similar to the EPA regulations at issue in this case. *See* 103 F.R.D. at 14. The DOT regulations, however, flatly barred testimony of a DOT employee as an expert or opinion witness in any legal proceeding between private litigants.

Judge Van Artsdalen held that Perez would be ordered to testify as to facts but not opinions. 103 F.R.D. at 15. In his analysis, Judge Van Artsdalen judicially reviewed DOT's application of its regulations, and agreed with SEPTA's contention that DOT's decision not to permit Perez to testify as to factual matters was an unreasonable exercise of discretion. 103 F.R.D. at 14. He also held that the purposes of the DOT regulations would not be offended or undermined by allowing testimony on factual matters. DOT did not appeal.

In this case, as in *SEPTA*, the testimony sought is factual, not expert, in nature, and no other witness is competent to testify regarding the pertinent matter.

4.

The court of appeals acknowledged petitioners' need for the factual testimony of EPA's employee to provide a basis for the admission into evidence of results of air monitoring tests performed by the employee. Pet. App. A-3 to A-4. As the court of appeals said:

> For purposes of this appeal, we accept Appellants' representation that if they are unable to have the EPA results admitted, it could hamper their own experts' attempts to prove that the [gasoline] spill did not cause damage to the homeowners or their property because Pennsylvania law requires that expert opinion testimony be based on facts

admitted in evidence. *See Murray v. Siegal*, 413 Pa. 23, 195 A.2d 790 (1963).

Pet. App. A-4 to A-5.

In a long footnote concerning Pennsylvania law respecting the permissible bases for expert testimony, respondents suggest that expert witnesses may be able to rely on the EPA results in documentary form. Resp. Mem. Opp. 9 n.7. The short answer, however, is that the Pennsylvania court before which the civil damage claims are pending has been requested to make an *in limine* ruling that the EPA data is admissible but the court has refused to do so. Pet. App. A-4.[3] Correspondingly, respondents' offer to supply an affidavit does nothing to address the question of the admissibility of the EPA data.[4]

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3. In respect of their suggestion, respondents cite *In Re Glosser Bros., Inc.*, 382 Pa. Super. 177, 555 A.2d 129, 139-40 (1989), which applied Fed. R. Evid. 703 in upholding the admissibility of an accountant's expert testimony on the valuation of corporate stock. The Pennsylvania courts apply individual rules of the Federal Rules of Evidence on an *ad hoc* basis. In *Glosser Bros.*, the witness relied in part on an appraisal of certain corporate assets performed by Manufacturers' Appraisal Company, although no one from Manufacturers' was called to testify. *Id.*, 555 A.2d at 139. The court approved this use of inadmissible hearsay as a basis for the witness' expert testimony, in light of an exception to the general Pennsylvania rule. *Id.*, at 139-40. The Manufacturers' appraisal was the type of outside report routinely relied upon by accountants in doing a stock valuation, and the criteria of Fed. R. Evid. 703 were plainly met. *Id.*, at 140-42.

In the instant case, EPA does not routinely monitor private residences for air pollutants, and thus professionals could not routinely rely on such EPA data in the practice of their professions. Accordingly, the Pennsylvania appellate courts might well conclude that this case is not analogous to *Glosser Bros.* or to another area of exception to the Pennsylvania rule, a typical medical case, *e.g.*, where an oncologist might rely on the reports of a radiologist and a pathologist to diagnose and treat a cancer patient. It therefore remains speculative whether the EPA data can be admitted in documentary form over the objections of the homeowners.

4. EPA twice points out that it offered to provide Erdman's testimony by affidavit. Resp. Mem. Opp. 4 n.4 and 9 n.7. This underscores the arbitrary and unreasonable nature of the agency decision. An affiant cannot be cross-examined, and the homeowners would be deprived of the opportunity to adduce facts and inferences favorable to their position. It was illogical for the Regional Counsel to conclude that providing an affidavit does not "take sides," but a videotape deposition before all parties favors the petitioners.

A reversal of the Regional Counsel's decision may well have beneficial results. Right now the Newtown Crossing homeowners rely on the EPA's interpretation of its regulations as a means of excluding unfavorable factual evidence. If the EPA decision is reversed, the homeowners and other like-minded litigants may be encouraged to admit or stipulate factual evidence.

5.

The questions posed by this case are increasingly important to the administration of justice, as shown by the extensive (and procedurally frustrated) litigation over subpoenas issued to federal employees to obtain testimony. See Pet. App. A-11 to A-12 (majority) and A-18 (Weis, J., dissenting) and Resp. Mem. Opp. 11 n.10. The numerous requests to EPA for permission to take testimony from the agency's employees (Pet. App. A-16) also show the frequency with which these issues arise. The circumstances that (1) the majority of these requests were denied (*id.*), (2) *all* of the requests to EPA Region III have been refused (*id.*), and (3) there is a "current explosion in environmental litigation" (Resp. Mem. Opp. 11, quoting *Boron Oil Co. v. Downie*, 873 F.2d 67, 72 (4th Cir. 1989), also substantiate the need to resolve the issues reserved by this Court in *Touhy* and posed here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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